88- 1852

Supreme Court, U.S.
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No.

In The

Supreme Court Of The United States

OCTOBER TERM, 1988

BRADLEY FACILITIES, INC.,

Petitioner,

v.

J. WILLIAM BURNS, COMMISSIONER OF TRANSPORTATION FOR THE STATE OF CONNECTICUT,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

Submitted by:

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QUESTIONS PRESENTED

I. This Court has held that the Contracts Clause requires heightened scrutiny when a state seeks to impair a contract to which it is a party. This case raises the related and unresolved question whether heightened scrutiny is also mandated in the review of a state's calculation of the compensation owing to a private party from such an impairment.

II. In this case, the State of Connecticut terminated its contract with petitioner and awarded petitioner $146.38 for an asset valued in excess of one million dollars. Petitioner contends that the award is fundamentally unfair and violates the Takings Clause of the Fifth and Fourteenth Amendments.

LIST OF PARTIES

No parties other than those listed in the caption of this case participated in the proceedings below.

Petitioner Bradley Facilities, Inc. is a consortium of the following air freight forwarders and airlines: Emery Air Freight Corporation, American Airlines, Inc., Eastern Airlines, Flying Tigers and Air Express International Corporation.

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Respondent.

PETITION FOR WRIT OF CERTIORARI
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CONNECTICUT SUPREME COURT

The petitioner Bradley Facilities, Inc. prays that a writ of certiorari issue to review the judgment of the Connecticut Supreme Court rendered on December 27, 1988.

OPINIONS BELOW

The opinion of the Connecticut Supreme Court is reported at 209 Conn. 480, and is reprinted in the Appendix hereto, p. 1a, infra.

The decision of the Connecticut Superior Court state trial reference has not been reported. It is reprinted in the Appendix hereto, p. 40a, infra.

JURISDICTION

The judgment of the Connecticut Supreme Court was rendered on December 27, 1988. Petitioner's timely Motion for Reargument was denied on January 18, 1989. (A copy of the Order denying petitioner's Motion for Reargument is reprinted in the Appendix hereto, p. 39a, infra.)

On April 12, 1989, Justice Marshall issued an order extending the time for

filing this petition for writ of certiorari to and including May 12, 1989.

The jurisdiction of this Court to review the judgment of the Connecticut Supreme Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 10 of the United States Constitution provides in pertinent part:

> No State shall . . . pass any . . . Law impairing the Obligation of Contracts.

The Fifth Amendment to the United States Constitution provides in pertinent part:

> ...nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ...nor shall any State deprive any person of life, liberty, or property, without due process of law.

Section 13a-76 of the Connecticut General Statutes provides in pertinent part:

> Any person claiming to be aggrieved by the assessment of such special damages or such special benefits by the commissioner may, at any time within six months after the same has been so filed, apply to the superior court for the judicial district within which such land is situated or, if said court is not in session, to any judge thereof for a reassessment of such damages or such benefits so far as the same affect such applicant, and said court or such judge, after causing notice of the pendency of such application to be given to said commissioner, shall appoint a state trial referee to make such reassessment of such damages or such benefits. . . . If the amount of the reassessment of such damages awarded to any such property owner exceeds the amount of the assessment of such damages by the commissioner for such land, such trial referee shall award to such property owner such appraisal fees as such trial referee determines to be reasonable.

Section § 13b-42(e) of the Connecticut General Statutes provides in pertinent part:

> The commissioner may, in the name of the state, purchase, take or acquire any interest, in whole or in part, in land, buildings, equipment or facilities that he has sold, leased or granted in any state airport, state airport site or any part thereof pursuant to subsection (b) of this section. The commissioner's determination that such purchase, taking or acquisition is necessary shall be conclusive. Any taking shall be in a manner prescribed in section 13a-73 for the taking of land for highway purposes.

STATEMENT OF THE CASE

This case involves an attempt by the State of Connecticut to deprive petitioner of a contract right valued in excess of one million dollars. The courts below accepted respondent's contention that only nominal compensation was necessary for the termination of its contract with petitioner. Petitioner submits that the decisions below failed to apply the heightened scrutiny required under the Contracts Clause and the Takings Clause, where the State has deprived a party of rights under a contract to which it is a party. Petitioner further submits that the award of $143.68 upheld below is fundamentally unfair and constitutes a taking of its property without just compensation.

In 1961, the State of Connecticut requested petitioner to assist it in providing air freight facilities at Bradley International Airport, Windsor Locks, Connecticut. [T. 2-3].* At the State's request, petitioner entered into a written twenty-year lease with the State for land at the airport and agreed to construct an air cargo facility on the land. [T. 3; Pl.Ex. A (excerpted at 59a)]. Petitioner was further granted two five-year options and the right to sublet space in the facility. [Pl.Ex. A].

Petitioner complied with its obligations under the lease and constructed an air cargo building, spending in excess of one million

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* The symbols "[T.__]" and "[T_2.__]" denote references to the first and second volumes of trial transcript. The symbol "[Pl.Ex.__]" denotes references to petitioner's trial exhibits. The symbol "[R.__]" denotes references to the Record on Appeal.

dollars for construction and improvement of the facility. [T_2. 128-34]. In 1982, the facility was fully rented, with leases extending into 1987. Petitioner was receiving gross annual rentals of $296,750.00 and net profit of $225,560.00 per year. [T. 59].

In 1975, the State requested petitioner to relinquish its leasehold interest in a portion of the leased premises. [T. 20-26]. Petitioner agreed to do so, and in return the State and petitioner determined a fixed rental price for the option periods of petitioner's lease. [Pl.Ex. G]. Petitioner exercised its two five-year options in December 1979, and the lease was not due to expire until August 30, 1992. [T. 27-28; Pl.Ex. H, I].

In response to petitioner's exercise of its lease options, respondent advised petitioner that because of future expansion

projects at the airport, it intended to condemn petitioner's leasehold interest. [T. 36; Pl.Ex. I]. Under Connecticut law, while the State has an inherent right to take private property for public use, that right "lies dormant until set into motion by legislative enactment." Northeastern Gas Transmission Co. v. Collins, 138 Conn. 582, 586, 87 A.2d 139 (1952). At the time the State entered into its lease with petitioner, and continuing through 1981, the State did not have authority to condemn its own leases for airport land. [T_2. 115; Pl.Ex. O]. Accordingly, in 1981, respondent drafted and requested the Connecticut legislature to pass legislation authorizing respondent to condemn leasehold interests in airport lands, which the legislature did. [T_2. 115]. Respondent further had set aside one million dollars to pay for peti-

tioner's leasehold interest. [T. 31-33; Pl.Ex. J].

There can be no question that the legislation enacted, Connecticut General Statutes §13b-42(e), was directed solely to petitioner's lease and was intended to change the existing rights between petitioner and the State by affording the State a previously non-existent right to condemn petitioner's leasehold interest. As State Senator Thomas Serrani, Chairman of the Senate Transportation Committee, stated during legislative debate on the legislation:

> [T]hey're [the Department of Transportation] in a situation where they must condemn a lease on the property at Bradley. This would allow the Department again to relocate cargo facility owned by the Bradley Facilities, Inc. The B.F.I. has had a twenty year lease with ten [year] renewal option. They're currently in the 19th year of the lease and D.O.T. department would like to be able

> to condemn their own lease with this amendment. Now presently the Department of Transportation can condemn a fee simple property interest and they're seeking to do the same here with a leasehold (inaudible). Without the amendment the State of Connecticut, their hands would be tied in the negotiating process at Bradley Airport ...

[24 S. Proc., Part 8, 1981 Sess. at 2566].

As Senator Serrani made clear in remarks the next day, respondent requested the legislation because, unlike leases subsequently granted by respondent, petitioner's 1961 lease contained no clear understanding that condemnation of the leasehold was part of the agreement. [Id. at 2611].

In mid-1982, petitioner instituted an injunction action to restrain respondent's taking of the leasehold interest. [T. 40-41]. The parties resolved the action through entry of a stipulation [53a] which provided, inter alia, that no condemnation

would occur until another air freight facility had been built and that if petitioner's leasehold interest were condemned, the date of the condemnation would be deemed to be August 30, 1982. [54a-55a]. The stipulation expressly provided that petitioner's "agreement with said condemnation date shall not be deemed a waiver of any of its rights in connection with any condemnation award or acquiesence with or to the position of the State or defendant thereto." [55a].

In April 1984, respondent filed a Notice of Condemnation taking petitioner's leasehold interest and awarding petitioner one dollar in compensation for its lease. [Pl.Ex. L]. Respondent did not seek to condemn the title to the premises since it already owned the premises. [See T. 95]. Petitioner vacated the premises in July 1984. [T. 48-49].

In August 1984, petitioner instituted an appeal of the award of condemnation in Connecticut state court at Hartford, pursuant to Connecticut General Statutes §13a-76, [R. 1], and the matter was ultimately referred to a state trial referee for trial in September 1986 and March 1987. [R. 11].

At trial, respondent did not contend that the amount awarded constituted just compensation for respondent's leasehold interest. Rather, although respondent had previously represented to the Connecticut legislature that its lease with petitioner contained no understanding concerning condemnation of petitioner's leasehold interest (and although, as discussed below, its position was directly contrary to the interpretation of the lease by respondent's Transportation Counsel [<u>see</u> pp. 16-17, <u>infra</u>; Pl.Ex.

P]), respondent argued at trial that Article 28 of the lease governed the amount of any award and superseded petitioner's statutory and constitutional right to just compensation for the taking. [See, e.g., T. 100-01].

Respondent's invocation of Article 28 was plainly disingenuous. At the time the lease was signed and at all times thereafter, the federal government possessed the right to condemn the State's land at Bradley Airport, including the land leased to petitioner. [See, e.g., T. 95]. The parties' lease contained a standard condemnation clause providing, in the event of condemnation of the demised premises, for allocation of any condemnation award between landlord and tenant. [66a-69a]. The lease provision, Article 28, provided that the tenant's share of any condemnation award was to be determined based on the amount of its con-

struction costs, the length of the time remaining on the lease, and any dimunition in rental value resulting from the condemnation. [66a].

Article 28 is plainly inapplicable to any condemnation by the State of petitioner's leasehold interest. [See Pl.Ex. P at 2]. The provision is expressly directed to a condemnation of the "entire Demised Premises, or so much thereof that the remainder is not useful to the Tenant" [66a]; and the term "demised premises" is defined in the lease to mean "the particular premises shown outlined in red" on a site plan attached to the lease depicting the land owned by the state subject to the lease "(which particular premises so shown, with the building and improvements to be constructed thereon, are hereinafter called the 'Demised Premises')." [61a].

Article 28 unambiguously differentiates between a condemnation of the demised premises -- owned, of course, by the State -- and one of the tenant's leasehold interest, in a later paragraph dealing with a temporary taking which begins: "If ... the whole or any part of the Demised Premises or of the building or of Tenant's interest under this lease shall be taken or condemned by any competent authority for temporary use or occupancy ..." [68a (emphasis added)].

Indeed, a memorandum [Pl.Ex. P] prepared by respondent's Transportation Counsel in December 1980 expressly states that Article 28 "was not intended to be used by the State:"

> As we have discussed before, I believe that the condemnation clause was not intended to be used by the State for termination purposes. I believe this clause relates to a taking by the Federal government or any other agency specifically authorized to acquire property at the airport. The

> language of this provision indicates that the landlord would also be receiving some award and the terms go on to describe how the landlord and the tenant will share in such proceeds. Obviously, as we are the taking authority we would not be sharing an award but would be issuing an award.

[Id. at 2].

Respondent contended at trial that under Article 28 the award to petitioner for its leasehold interest should be $146.38 [$T_2$. 136], even though petitioner's expert appraiser -- whose qualifications were stipulated to by respondent [T_2. 50] -- valued the leasehold interest at $1,066,000.00. [$T_2$. 54; Pl.Ex. R]. Respondent at no point contended that its proposed award was adequate actual compensation for the loss of the leasehold right.

The trial court subsequently adopted respondent's argument that Article 28 should be controlling, and applying the formula set

forth in Article 28, awarded petitioner $146.38. [52a]. The trial court denied petitioner's motion for articulation of the basis for this conclusion. [R. 36].

Petitioner argued in the trial court that respondent's refusal to pay just compensation would constitute an inequitable and unlawful invalidation of respondent's contract with petitioner. [Pl's Trial Mem. dated August 29, 1986 at 4, 7-8; 14-15; Pl's Mem. dated October 8, 1986 at 4, 7-8]. Petitioner cited, as one authority for this argument, this Court's decision in U.S. Trust Co. v. New Jersey, 431 U.S. 1 (1977) [Id. at 8; 8], and urged the trial court to set aside respondent's award of $1.00 and award "full and just compensation" to petitioner. [Id.].

A majority of the Connecticut Supreme Court affirmed the trial court's decision,

adopting the State's argument that Article 28 should be read to apply to this condemnation. [1a, 13a-19a]. On appeal to the Connecticut Supreme Court, petitioner expressly argued that the award violated its rights under the Contracts Clause of the United States Constitution and the Takings Clause of the Fifth and Fourteenth Amendments to the United States Constitution. [Appellant's Brief at 30-34]. The Connecticut Supreme Court considered and rejected petitioner's federal constitutional contentions in its decision, [33a-36a], focusing on the impairment of contract claim as the basis for petitioner's takings claim as well. [33a].

Justice Callahan, dissenting in the Connecticut Supreme Court, argued that it was clear that Article 28 was not applicable to this condemnation. [37a-38a].

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD ADDRESS AND DETERMINE THE STANDARD OF REVIEW APPLICABLE UNDER THE CONTRACTS CLAUSE AND THE TAKINGS CLAUSE TO A STATE'S DETERMINATION OF COMPENSATION FOR IMPAIRMENT OF ITS CONTRACTUAL OBLIGATIONS.

This case presents an unresolved question concerning the standard of review applicable to a state's assessment of compensation for the taking of a right under a contract to which the state is itself a party.

This Court has held that a state's impairment of a contract is constitutional under Article I, §10, if it is "reasonable and necessary to serve an important public purpose." United States Trust Co. v. New Jersey, 431 U.S. 1, 22 (1977); see Home Building and Loan Assoc. v. Blaisdell, 290 U.S. 398, 444-45 (1934). The Court has further distinguished impairments of contracts between private parties from impair-

ments of contracts to which the State is a party. In the former case, courts should "properly defer to legislative judgment as to the necessity and reasons of the particular measure;" Energy Reserves v. Kansas Power & Light, 459 U.S. 400, 412-13 (1983). In the latter case, "particular scrutiny" of a modification of a contract is warranted; Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 245 (1978); "because the State's self-interest is at stake." United States Trust Co. v. New Jersey, 431 U.S. at 26; see Keystone Coal Association v. DeBenedictis, 480 U.S. 470, 505 (1987); Energy Reserves v. Kansas Power & Light, 459 U.S. at 413.

This case presents the issue whether such heightened scrutiny is applicable to a state's determination of the compensation owed to a party when the state has effected

a taking of that party's rights under a contract between them. This issue, although applicable whenever a state impairs its own contractual obligation with a private party, has never been addressed by this Court. Petitioner submits that constitutional protections provided by the Contracts Clause of Article 1, §10 of the United States Constitution and the Takings Clause of the Fifth and Fourteenth Amendments to the United States Constitution require close scrutiny of the state's assessment of damages owing for the taking of such a contract right.

It is clear that if close scrutiny is applied here, the nominal award made by the State cannot survive.

In this case, petitioner had, at the time of condemnation, a leasehold interest valid for ten more years producing net profit in excess of $225,000.00 per year.

Under Connecticut law, a valuation of the leasehold interest property included the ten-year option period. Canterbury Realty Co. v. Ives, 153 Conn. 377, 384, 216 A.2d 426 (1966). Moreover, petitioner had constructed, at the State's request pursuant to the lease, an air freight facility costing in excess of one million dollars. Petitioner's appraiser testified at trial, without rebuttal, that the fair market value of petitioner's lease was $1,066,000.00, and respondent had set aside one million dollars to purchase petitioner's leasehold interests.

Furthermore, the nominal award approved in this case is not supported by a fair reading of the parties' agreements and is contrary to the position respondent maintained in the Connecticut legislature, where it acknowledged that because petitioner's

lease was twenty years old, it contained no understanding as to the State's rights of condemnation. It is also directly contrary to the opinion of respondent's Transportation Counsel, who expressly stated in a memorandum concerning this condemnation in December, 1980 that Article 28 is not applicable to a condemnation by the landlord-State. [Pl.Ex. P at 2].

Petitioner does not contend that the State was barred from condemning its leasehold interests by the absence of legislative authority to condemn a leasehold interest at the time the lease was executed. See West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 532 (1848). Petitioner does contend, however, that it is patently unfair for the State to argue that the terms of the lease were intended by the parties to limit petitioner's right to adequate compensation for

condemnation by the State of petitioner's leasehold interest, when the State acknowledges that such condemnation was unanticipated by the parties.

In upholding the State's award of nominal damages, the lower courts adopted the tortured reading of the parties' lease asserted by respondent. The issue presented by this petition is not simply whether respondent's analysis of Article 28 might be upheld; petitioner recognizes that this Court does not sit to review state law contract actions. The issue, rather, is standard of review: Are courts required, under the contracts and takings clauses, to scrutinize closely the calculation of compensation owed for the taking of a right created by a contract to which the state is a party?

Under such scrutiny, the award here must be vacated. As Justice Callahan stated in

his dissent, "it appears clear to me that the condemnation clause in the lease was not intended to apply to a taking of the [petitioner's] leasehold interest by the lessor, the [respondent] Commissioner of Transportation." [37a].

II. THE COMPENSATION AWARDED PETITIONER BY THE STATE FOR PETITIONER'S LEASEHOLD INTEREST IS SO PATENTLY INADEQUATE AND SO CLEARLY VIOLATES THE TAKINGS CLAUSE REQUIREMENT OF JUST COMPENSATION THAT RELIEF FROM THIS COURT IS MANDATED.

The State's conduct here is so inequitable that this Court's review is mandated. After initially inducing petitioner to enter into this lease and invest over one million dollars to construct an air cargo facility, the State has deprived petitioner of a million dollar contract right for nominal damages on the purported basis of a condemnation clause that the State itself acknowledged was inapplicable.

The Takings Clause of the Fifth and Fourteenth Amendments to the United States Constitution prohibits the State from terminating petitioner's contract rights without just compensation. The award here is so fundamentally unfair and so plainly does not constitute just compensation for the taking involved, that review is warranted. See United States v. General Motors Corp., 323 U.S. 373 (1945).

CONCLUSION

For the foregoing reasons, petitioner prays that its Petition for a Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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BRADLEY FACILITIES, INC. v.
J. WILLIAM BURNS,
COMMISSIONER OF TRANSPORTATION
(13458)

Healey, Shea, Callahan, Hull and Santaniello, Js.

The plaintiff, which leased from the state a parcel of land on which it had constructed an air freight terminal at Bradley International Airport, appealed to the trial court from the assessment of damages in the amount of $1 filed by the defendant commissioner of transportation in connection with the 1984 taking by eminent domain of the plaintiff's leasehold interest. The lease was originally scheduled to run from September 1, 1962 through August 31, 1982, and the plaintiff was given options to extend the term for two consecutive additional periods of five years each. In 1982 the state notified the plaintiff of its intention to proceed with a condemnation of the leasehold and the plaintiff brought an action to enjoin the taking. The action was settled by way of a stipulated judgment pursuant to which the parties agreed that, inter alia, if the state should exercise its right of eminent domain, the condemnation should be deemed to have occurred on August 30, 1982. The trial court ruled that damages were to be determined in accordance with the condemnation clause of the lease rather than on the basis of fair market value and awarded the plaintiff $146.38. On the plaintiff's appeal, held:

1. There was nothing in the language of the condemnation clause to support the plaintiff's claim that that clause was intended to become operative only when the state's fee interest in the property, as well as the lessee's interest, was taken by eminent domain.
2. The plaintiff could not prevail on its claim that the parties to the lease never intended that the condemnation clause should apply to a taking by the state, but only to a taking by a federal agency.
3. The plaintiff's claim that the state acted inequitably in seeking to take the leasehold interest during the original term of the lease when the condemnation clause was applicable and before a sufficient necessity had arisen was unavailing; not only did the plaintiff agree, in the earlier stipulated judgment, that an eventual condemnation would be deemed to have occurred August 30, 1982, but there was ample evidence presented to the effect that the state was motivated by a desire to meet its construction schedule as well by the circumstance that the formula in the lease condemnation clause would operate to limit the amount of the award only if the condemnation occurred before the expiration of the original term.
4. The plaintiff's claim to the contrary notwithstanding, the condemnation of a property right granted by the state does not violate the constitutional prohibition against impairment of contract; all such agreements are presumed to have been entered into subject to the condition that the state may elect during the term of the agreement to exercise its power of eminent domain.

Argued October 14 -- decision released December 27, 1988

Appeal from the defendant's assessment of damages for the taking by condemnation of the plaintiff's leasehold interest in certain real property owned by the state, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford and referred to Hon. Charles S. House, state trial referee, who, exercising the powers of the Superior Court, rendered judgment for the plaintiff increasing the award of damages, from which the plaintiff appealed. No error.

Lawrence M. Lapine, with whom were Thomas M. Cassone and, on the brief, Christopher R. Bello, for the appellant (plaintiff).

Michael J. Lombardo, assistant attorney general, with whom, on the brief, was Joseph I. Lieberman, attorney general, for the appellee (defendant).

SHEA, J. In this action the plaintiff Bradley Facilities, Inc., appealed from the assessment of damages filed by the defendant commissioner of transportation pursuant to General Statutes §§ 13b-42(e) and 13a-73 in taking by eminent domain the plaintiff's leasehold interest in an air freight terminal at Bradley International Airport. In accordance with General Statutes § 13a-76, a state trial referee, Hon. Charles S. House, was appointed to reassess the damages, and he rendered judgment awarding the plaintiff $145.38 as damages for the taking. From that judgment the plaintiff has appealed to the Appellate Court, and the appeal has been transferred to this Court.

The principal issue is whether the assessment of damages is to be determined upon the basis of the fair market value of the leasehold taken or must be made in accordance with a condemnation clause of the lease, as the referee concluded. We conclude that the condemnation clause is applicable and determinative of the award. Accordingly, we find no error.

The significant facts are undisputed. On October 18, 1961, the state leased to the plaintiff a parcel of land at Bradley airport in Windsor Locks upon which the tenant was obliged to construct a building and other facilities to be used as an air freight terminal which would become the property of the lessor upon completion of construction. By an amendment to the lease on July 27, 1962, it was agreed that the original lease term would be the twenty year

period from September 1, 1962, through August 31, 1982. The lessee was given options to extend the term of the lease for two consecutive periods of five years each. In December, 1979, the plaintiff notified the state that it was exercising these renewal options, thus extending the term of the lease for an additional period of ten years commencing September 1, 1982. On January 30, 1980, the state informed the plaintiff that plans for improvement of the airport made it necessary to acquire the plaintiff's leasehold interest by negotiation or by condemnation and that the state intended to complete this acquisition during the original lease term that would expire on August 31, 1982.

The lease between the parties contained a clause providing that, in the event of a condemnation during its original term, the

lease would terminate and "there shall be paid or turned over to Tenant, as or from the award for such taking, a sum" representing the unamortized investment of the tenant in the lease allocated over the original lease term.[1]

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[1] The text of the condemnation clause in the lease was as follows: "28. Condemnation. In the event that the entire Demised Premises, or so much thereof that the remainder is not useful to Tenant, be taken by condemnation or eminent domain during the Original Term of this lease, this lease shall terminate, and there shall be paid or turned over to Tenant, as or from the award for such taking, a sum calculated by multiplying the Tenant's Original Investment (as hereinafter defined) successively by two fractions: (1) a fraction whereof the numerator is the number of days between the date of the vesting of title and the date of expiration of the Original Term of this lease, and the denominator is the number of days in the Original Term, and (2) a fraction whereof the numerator is the then rental value immediately before such taking of the premises taken and the denominator is the then rental value of the entire Demised Premises immediately before such taking. Nothing herein contained shall require Landlord to pay to Tenant any sum in excess of the total award for such taking.

In 1982, the state notified the plaintiff of its intention to proceed with a condemnation of the leasehold. The plaintiff brought an action against the defendant to enjoin the taking. This action was settled through negotiations, however, and

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In the event of any other partial taking, this lease shall terminate only as to the part so taken, and the Fixed Rent for the balance of the then current term shall be reduced by the fraction last above set forth, but Landlord shall, from it share of the total award or otherwise, bear the expense of the restoration to a rentable condition of the untaken balance of the Demised Premises.

As used herein, the phrase 'Tenant's Original Investment' shall mean the total costs to Tenant of the improvements specified in Article 1 hereof, plus all expenses of Tenant incurred in connection therewith and capitalized by Tenant in accordance with good accounting practice.

If, at any time during the Original Term or any extended term hereof, the whole or any part of the Demised Premises or of the Building or of Tenant's interest under this lease shall be taken or condemned by any competent authority for temporary use or occupancy, this lease shall not terminate by reason thereof, and Tenant shall continue to pay in the manner and at the times herein specified, the full amounts of the rent and

terminated on August 17, 1982, in a judgment by stipulation. Under the stipulation it was agreed that the state would continue with its plans for expansion of Bradley airport, which included the proposed demolition

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all additional charges payable by Tenant hereunder, and, except only to the extent Tenant may be prevented from so doing pursuant to the terms of the order of the condemning authority, Tenant shall continue to perform and observe all of the other terms, covenants, conditions and obligations hereof on the part of Tenant to be performed and observed, as though such taking had not occurred. In the event of any such taking, Tenant shall be entitled to receive the entire amount of any award made for such taking, whether paid by way of damages, rent or otherwise, unless such period of temporary use or occupancy shall extend beyond the expiration date of the Original Term of this lease or (in the event that the term hereof shall have been extended as hereinafter provided) of any extended term hereof, in which case such award shall be apportioned between Landlord and Tenant as of such date of expiration. The existence or possible continuation of any such period of temporary use or occupancy shall not affect the right of Tenant, as against Landlord, to exercise any of Tenant's options to extend the term of this lease."

of the building occupied by the plaintiff. The state agreed, however, not to proceed with an actual condemnation of the leasehold of the existing air freight terminal operated by the plaintiff until a substitute facility had been constructed and was ready for occupancy. The stipulation also provided that, if the state should exercise its right of eminent domain, the condemnation should be deemed to have occurred on August 30, 1982, one day before the expiration date of the original term of the lease. The parties also agreed that the plaintiff's acceptance of such date as the condemnation date would not constitute a waiver of any of its rights with respect to the condemnation award.

On April 2, 1984, the defendant filed a certificate of taking for the plaintiff's leasehold interest and assessed the damages

at $1. The plaintiff, which had continued to operate the air freight terminal after the stipulated judgment had been rendered, remained in possession until some time in July, 1984.

At the hearing before the referee, the plaintiff presented evidence that the fair market value of its leasehold interest was $1,066,000 based upon the assumptions that the condemnation clause of the lease was inapplicable and that the unexpired term of the lease was not limited to the original expiration date of August 31, 1982. The state's sole witness was an accountant who testified that he had calculated the damages in accordance with the formula set forth in that condemnation clause and had thus determined the damages for the taking to be $146.38. The referee accepted this computation and, allowing for the $1 deposited with

the clerk of court at the time the taking certificate had been filed, rendered judgment for the plaintiff to recover $145.38 damages plus an expert witness fee of $3000.

The plaintiff claims on appeal (1) that the language of the condemnation clause bars its application in this case, (2) that the parties never intended that the clause should apply to a taking by the state, (3) that inequitable conduct on the part of the state should bar it from acquiring the plaintiff's leasehold for the small sum awarded, and (4) that in enacting General Statutes § 13b-42(e), which specifically authorized the defendant to condemn "any interest . . . in land, buildings, equipment or facilities that he has . . . leased or granted in any state airport," and in applying it to the plaintiff's leasehold, the state had violated the constitutional rights of the

plaintiff under our state and federal constitutions.

I

The plaintiff maintains that the condition precedent to the application of the condemnation clause, "that the entire Demised Premises . . . be taken by condemnation or eminent domain," was never fulfilled and that the clause, therefore, is inapplicable. It contends that a taking of the "entire Demised Premises" refers to a taking of the fee in the land described in the lease, which the state held before the execution of the lease and continued to hold after the taking of the plaintiff's leasehold interest. A condemnation of the leasehold only, the plaintiff argues, does not constitute a taking of the "entire Demised Premises."

The significance of the word "entire," however, is readily apparent in the context of the clause that follows the phrase "entire Demised Premises": "or so much thereof that the remainder is not useful to Tenant." Its reference is to the physical parcel of land being leased and not to the diverse interests that may exist in that land, such as those of the lessor and the lessee. This interpretation of the word "entire" is reinforced by the reference in the second paragraph of the condemnation clause to "any other partial taking," allowing for a reduction in rent where the portion of land condemned does not render the remaining leased property useless to the lessee. Thus the use of the word "entire" does not support the plaintiff's claim that the condemnation clause was intended to apply only where all of the outstanding interests in the land

that is the subject of condemnation are acquired.

The term "Demised Premises" is defined in the lease to mean the "particular premises shown outlined in red on the annexed copy" of a specified site plan "(which particular premises so shown, with the building and improvements to be construed thereon, are hereinafter called the 'Demised Premises')." The word "demised" in this context means "leased." Webster's Third New International Dictionary; Black's Law Dictionary (5th Ed.). "Premises" in common parlance signifies land with its appurtenances, though it more appropriate meaning in a conveyance, such as a deed or lease, is "that which is conveyed." Holbrook v. Debo, 99 Ill. 372, 381 (1881); see Zandri v. Tendler, 123 Conn. 117, 123, 193 A. 598 (1937).

When we speak of taking land by eminent domain, we use the word "taking" figuratively, because the land remains physically undisturbed. What is taken or acquired by the condemning authority are the various interests of others in the land. While the condition that triggers the operation of the condemnation clause in the lease before us is that the "entire Demised Premises, or so much thereof that the remainder is not useful to Tenant, be taken by condemnation or eminent domain," the parties must be deemed to have contemplated as the precipitating event the transfer of rights in the land to the taking authority.

The plaintiff maintains, however, that this phraseology must be construed to refer only to an acquisition of the whole bundle of rights in the land, the fee simple, by some agency other than the state, which

already owned the fee. In such a condemnation, which the federal government conceivably might have brought, an award, corresponding to the total value of the land and improvements taken, would have been made. This sum, nevertheless, would have been allocated between the state and the plaintiff pursuant to the formula contained in the condemnation clause. The result would have given the plaintiff the same amount for the termination of its leasehold as it is entitled to receive under the judgment of the trial court.

The position of the plaintiff is that, if a condemning authority, whether state or federal, should choose to take only its leasehold interest, the parties intended the condemnation clause formula not to apply. It is highly improbable, however, that such an intention would have been entertained

because it would result in the plaintiff receiving significantly disparate amounts as compensation for the taking of the same leasehold interest depending upon whether the fee were also taken.

Contrary to the plaintiff's claim, the lease does contain language applicable to a taking of only its leasehold interest. The condemnation clause provides that upon a taking "this lease shall terminate, and there shall be paid or turned over to Tenant, as or from the award for such taking, a sum calculated" in accordance with the formula set forth. (Emphasis added.) The alternative, "as . . . the award for such taking," in contrast to "from" such award, is a clear indication that a taking of only the leasehold was contemplated by the parties as one of the events triggering the condemnation clause. The plaintiff

could receive a sum "as . . . the award for such taking" rather than "from" such award only when its interest, but not that of the state, was taken in a condemnation proceeding.

We conclude that there is nothing in the language of the condemnation clause to support the plaintiff's claim that it was intended to become operative only when the state's interest, as well as the lessee's interest, is taken by eminent domain.

II

The plaintiff's second claim, that the parties to the lease never intended that the condemnation clause should apply to a taking by the state, is closely related to the claim we have rejected, that the language of the clause precludes such an application. In support of its second claim, the plaintiff contends that (1) at the time the lease

was executed, the defendant had no statutory authority to condemn facilities at a state airport, as now provided by § 13b-42(e),[2]

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[2] General Statutes § 13b-42(e) provides as follows: "The commissioner may, in the name of the state, purchase, take or acquire any interest, in whole or in part, in land, buildings, equipment or facilities that he has sold, leased or granted in any state airport, state airport site or any part thereof pursuant to subsection (b) of this section. The commissioner's determination that such purchase, taking or acquisition is necessary shall be conclusive. Any taking shall be in a manner prescribed in section 13a-73 for the taking of land for highway purposes."

This provision was enacted in 1981. Public Acts 1981, No. 81-472, § 127. General Statutes § 13b-42(c), the statutory predecessor of which was enacted in 1947; Public Acts 1947, No. 337, § 1; also arguably may have authorized the condemnation of the plaintiff's leasehold interest: "The commissioner may . . . purchase or take and, in the name of the state, may acquire title in fee simple to, or any lesser state, interest or right in, any airport . . . owned or controlled . . . by any other person . . . ." General Statutes § 13b-36(a) also may have provided such authority: "The commissioner may purchase or take and, in the name of the state, may acquire title in fee simple to, or any lesser estate, interest or right in, any land, buildings, equipment or facilities which the commissioner finds necessary for the operation or improvement

and that (2) the sole purpose of the condemnation clause was to provide for the possibility of a taking by some federal agency. Again we note that the plaintiff would have been entitled to receive exactly the same award for the condemnation of its leasehold interest by a federal authority as it has received under the judgment as compensation from the state, because the condemnation clause formula is applicable to any taking by eminent domain. The plaintiff does not claim that it would have been

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of transportation services." This statute had been amended in 1974 by substituting "transportation" services for "rail or motor carrier" services. Public Acts 1974, No. 74-342, §37. An intradepartmental memorandum of counsel for the transportation department dated July 26, 1979, which discusses problems involved in planning the condemnation of the plaintiff's leasehold, concluded that the application of these existing statutes might be "questioned." We are not required to resolve the issue of the applicability of these earlier statutes in deciding this case.

better off if the condemning authority had not been the state, but that it had a reasonable expectation that no condemnation by the state was likely to occur during the term of the lease.

"It is a fundamental principle of law that the power to appropriate private property for public use is an attribute of sovereignty and essential to the existence of government." Northeastern Gas Transmission Co. v. Collins, 138 Conn. 582, 586, 87 A.2d 139 (1952). "But into all contracts, whether made between States and individuals or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed,

and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur. Such a condition is the right of eminent domain." West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 532-33, 12 L. Ed. 535 (1848).[3] "It attaches to every

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[3] In West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 532 12 L. Ed. 535 (1848), the state of Vermont had in 1795 granted the plaintiff the exclusive privilege of erecting a toll bridge across a river and this franchise was to continue for one hundred years. In 1839 the Vermont legislature enacted a statute authorizing the taking of private property, including franchises, for the purpose of laying out public highways. The United States Supreme Court rejected the action brought by the plaintiff to enjoin the condemnation, holding that the taking of the franchise did not violate the prohibi-

man's land, and is paramount to his right of ownership. All titles are held subject to it." Water Commissioners v. Johnson, 86 Conn. 151, 164, 84 A. 727 (1912). "[A] leasehold interest acquired from the State is as completely subject to condemnation for public use as a title derived from any other source . . . ." Cox v. Revelle, 125 Md. 579, 584, 94 A. 203 (1915); see Danbury v. Danbury Airport Corporation, 9 Conn. Sup. 319, 321 (1941).

The plaintiff has not disputed these principles but maintains that the claimed absence of authority for the defendant to

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tion in article I, § 10, of the federal constitution against state enactment of any "law impairing the obligation of contracts." The opinion of the court relied partly upon the case of Enfield Toll Bridge Co. v. Hartford and New Haven Railroad Co., 17 Conn. 454 (1846), where this court had reached a similar conclusion in sanctioning a breach of a legislative franchise to erect a bridge across the Connecticut river subject to the payment of compensation.

condemn airport property in 1961,[4] when the lease was signed, might reasonably have been relied upon as assurance that only a taking by some federal authority would cause the lease to terminate pursuant to the condemnation clause. The plaintiff acknowledges that parties are presumed to have contracted with reference to existing law; Hatcho Corporation v. Della Pietra, 195 Conn. 18, 21, 485 A.2d 1285 (1985); but contends that it was not bound to anticipate the enactment of § 13b-42(e), which nineteen years later authorized the defendant to condemn its leasehold.

Since the condemnation clause of the lease, as we have concluded in Part I, is compatible with a taking by any authority having the power to take property by eminent

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[4] See footnote 2, supra.

domain, it does not inhibit in any manner the state's exercise of that power by enacting legislation to implement this inherent attribute of sovereignty to which all contracts, including this lease, are subject. West River Bridge Co. v. Dix, supra. In signing the lease the plaintiff became bound by a reasonable construction of its terms. That document contains no provision to assure the plaintiff that the state would not exercise its power of eminent domain during the lease term. Even if statutes in existence at the time the lease was executed might have been inadequate to support the taking of a leasehold at Bradley airport, the plaintiff must be presumed to have been aware that the legislative branch of the state, the lessor, might at any time enact the necessary legislation to do so. The plaintiff does not claim to have bargained

for any restriction upon the power of the state to enact such legislation during the term of the lease. "[A] promise not expressly made will not be read into a contract unless it arises by necessary implication from the term of the agreement." Bria v. St. Joseph's Hospital, 153 Conn. 626, 631, 220 A.2d 29 (1966); Texaco, Inc. v. Rogow, 150 Conn. 401, 408, 190 A.2d 48 (1963). In executing the lease, the plaintiff is presumed to have been aware that it contains no exception to the applicability of the condemnation clause for a taking initiated by the state. Since the language of the clause is sufficiently broad to include a condemnation by the state as a triggering event, the plaintiff gains nothing from its claimed expectation that the clause would apply only to a taking by some federal authority.

In asserting that the sole purpose of the condemnation clause was to provide for the possibility of a federal taking, the plaintiff has not referred to any evidence concerning the actual intentions of the parties in 1961 when the lease was executed. It relies instead upon various intradepartmental memoranda prepared at the time the condemnation of the leasehold was under consideration in which counsel for the transportation department expressed the opinion that "the intent of the clause was to relate to a Federal takeover since the State at that time did not have a clear-cut statutory right to condemn out its own lease."[5] The opinion of this official of the transportation department, rendered about twenty years after the lease had been executed, does not

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[5] See footnote 2, supra.

constitute evidence of the intention of the parties at the time of its execution. Further, the state is not bound by the construction of the lease made by this official solely for use of the department, which we have concluded in Part I was erroneous.

III

The plaintiff claims that the state should be barred from invoking the formula in the condemnation clause of the lease to limit the award because of its alleged inequitable conduct in seeking to condemn the plaintiff's leasehold interest "during the Original Term" of the lease simply for the purpose of saving money. The defendant relies upon the fact that the state did not actually file its notice of condemnation until April 2, 1984, and that the plaintiff was not required to vacate the leased premises until July, 1984. The earlier attempt

by the state in 1982 to condemn the leasehold had been forestalled by the plaintiff's action seeking an injunction. The stipulated judgment terminating that action had specified that, if the state should later commence a condemnation proceeding, it would be deemed to have occurred on August 30, 1982, a date within the original lease term during which the condemnation clause was applicable.

There was ample evidence that when the state notified the plaintiff in 1982 of its intention to acquire the leasehold prior to August 31, 1982, the expiration date of the original lease term, it was motivated by a desire to meet its construction schedule as well as by the circumstance that the formula in the lease condemnation clause would operate to limit the amount of the award only for a condemnation occurring within the

original term. Under the stipulated judgment, the parties agreed that a later condemnation would be deemed to have occurred within the original term and also that, until a substitute air freight facility had been constructed, the plaintiff could remain in possession of the existing facility. There is nothing inequitable in holding the plaintiff to its bargain concerning the effective condemnation date when it has enjoyed the fruits of the concession obtained from the state as part of the stipulation that enabled it to operate the existing facility for almost two years after the condemnation might otherwise have occurred. It can hardly rely upon the delay in the actual filing of the condemnation notice as support for its contention that the state acted inequitably in attempting to commence the condemnation within the original lease term, when

that delay resulted from its agreement with the state.

Furthermore, the claim that the state acted inequitably in seeking to take the plaintiff's leasehold interest before a sufficient necessity had arisen raises issues that were involved in the earlier action for an injunction. The stipulated judgment must be deemed to have foreclosed the plaintiff from pursuing those claims further. It is true, as the plaintiff contends, that the stipulation contains a reservation of rights clause: "The plaintiff's agreement with said condemnation date shall not be deemed a waiver of its rights in connection with any condemnation award or acquiescence with or to the position of the state or defendant thereto." This language cannot be given the effect of preserving the plaintiff's claim that the state has acted inequitably in

exercising its right to condemn within the original term of the lease when the plaintiff agreed in the stipulation that the impending condemnation "shall be deemed to have occurred on August 30, 1982," the day before expiration of such term.

IV

Finally, the plaintiff claims that § 13b-42(e), the statute authorizing the taking of the plaintiff's leasehold, as applied in conjunction with the lease condemnation clause, violates the prohibition against the impairment of contract contained in article I, § 10, of our federal constitution.[6]

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[6] The plaintiff also relies upon the prohibition in the fifth amendment to our federal constitution, applicable to the states by virtue of the due process clause of the fourteenth amendment, providing: "nor shall private property be taken for public

Our interpretation of the condemnation clause of the lease, which makes it applicable to a taking of the plaintiff's leasehold interest by any authority having the power of eminent domain, including the state, leaves little substance to this constitutional claim. As we have noted, the condemnation of a property right granted by the state does not violate the constitutional prohibition against impairment of contract because all agreements are presumed to have been entered into subject to the

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use, without just compensation." Further reliance is placed upon a similar provision of our state constitution, article first, § 11, which provides, "The property of no person shall be taken for public use, without just compensation therefor." The discussion in the plaintiff's brief, however, relates to impairment of contract as the basis for the claim of taking property without just compensation. Accordingly, we confine our discussion of this issue to the question of whether there has been an impairment of contract.

condition that the state may elect during the term of the agreement to exercise its power of eminent domain. West River Bridge Co. v. Dix, supra. The use of that power, of course, imposes on the state the obligation to compensate an owner fairly for the property interest taken. Id. Where parties to a lease have agreed in advance that, in the event of a condemnation, the lessee's award will be calculated pursuant to a prescribed formula, the resulting sum must be deemed fair compensation because it is in accordance with the agreement. However inadequate the amount arrived at through the formula might appear in the absence of such an agreement, an award made pursuant to the agreement cannot be regarded as an impairment of contract.

We previously have upheld the enforceability of similar condemnation clauses in

leases. Waesche v. Redevelopment Agency, 155 Conn. 44, 49-50, 229 A.2d 352 (1967); see United States v. Petty Motor Co., 327 U.S. 372, 375-76, 66 S. Ct. 596, 90 L. Ed. 729, reh. denied, 327 U.S. 818, 66 S. Ct. 813, 90 L.Ed. 1040 (1946); annot., 96 A.L.R.2d 1140, 1145. The plaintiff does not challenge that holding and implicitly concedes that, if the condemnor had been some federal authority, it would have been entitled to receive no more than is permitted by the judgment under review. Given our construction that the condemnation clause is applicable regardless of the identity of the condemning authority, there is no basis for claiming a constitutional violation when the plaintiff is to receive the same amount from the state as it would have received if the condemning authority were some federal agency.

There is no error.

In this opinion HEALEY, HULL and SANTANIELLO, Js., concurred.

CALLAHAN, J., dissenting. I respectfully dissent. It appears clear to me that the condemnation clause in the lease was not intended to apply to a taking of the plaintiff's leasehold interest by the lessor, the defendant commissioner of transportation. Therefore the formula for assessing damages contained in that clause has no application to the present situation. Consequently, the trial referee should not have used the formula in the lease when assessing damages, but rather should have employed the usual method of measuring damages for the taking of a leasehold interest. See Gigliotti v. Wood, 175 Conn. 243, 246 397 A.2d 1342 (1978). I believe that he erred in failing to do so.

I would remand this case for a new hearing to determine the value of the plaintiff's leasehold interest, including the option years,[1] without regard to the formula contained in the condemnation clause of the lease.

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[1] See Canterbury Realty Co. v. Ives, 153 Conn. 377, 384 216 A.2d 426 (1966).

STATE OF CONNECTICUT
SUPREME COURT

NO. 13458

BRADLEY FACILITIES, INC.

V.

COMMISSIONER OF
TRANSPORTATION : JANUARY 12, 1989

ORDER

THE MOTION OF THE PLAINTIFF, FILED JANUARY 5, 1989, FOR REARGUMENT, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED DENIED.

BY THE COURT,

/s/
CHIEF CLERK

NOTICE SENT: JANUARY 13, 1989.
Bellow, Lapine & Casone
Michael J. Lombardo, A.A.G.
Clerk, Hartford J.D.
(0297060)
Hon. Charles House
Reporter of Judicial Decisions

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NO. CV-029 70 60S

BRADLEY FACILITIES, INC.	:	SUPERIOR COURT
v.	:	JUDICIAL DISTRICT OF HARTFORD/NEW BRITAIN AT HARTFORD
COMMISSIONER OF TRANSPORTATION	:	MAY 28, 1987

MEMORANDUM OF DECISION

This is an appeal by the plaintiff, Bradley Facilities, Inc., from the defendant's assessment of damages of the taking by eminent domain of the plaintiff's interest in property at Bradley International Airport in Windsor Locks. The interest taken consisted of all the right title and interest of Bradley Facilities as a tenant in possession pursuant to a lease. Bradley Facilities is a consortium of air freight carriers which, pursuant to a land lease

from the state, constructed an air freight facility at the airport in which facility it subleased space to air freight carriers. A lease was entered into on October 18, 1961 for an original term of 20 years at a fixed rent. It also contained provision for two, 5-year renewal options at a then undetermined rent and contained a condemnation clause (Article 28). By a subsequent "Memorandum of Lease and Commencement Date Agreement" dated July 27, 1962, (Exhibit B), the date for commencement of the 20-year lease was agreed to be August 31, 1962 and August 31, 1982 would be the termination date of the original term.

In December 1969 (during the term of the 20-year lease), Bradley Facilities notified the defendant that it was exercising the two consecutive five-year renewal options (Exhibit H). On January 30, 1980, the defendant

acknowledged receipt of the notice by letter to Bradley Facilities' president (Exhibit I). The acknowledgment noticed that the option terms would not commence until September 1, 1982, informed the plaintiff that the State Department of Transportation had embarked on an expansion program for the airport which project required the demolition of the air cargo freight facility and gave "formal notice" that the State intended to acquire the plaintiff's leasehold interest in the freight facility "either through negotiations or through the condemnation rights contained in the agreement between Bradley Facilities, Inc., and the State". The notice further stated "It is our intention to conclude this acquisition during the 'Original Term' of the Agreement."

The "condemnation rights contained in the agreement between Bradley Facilities, Inc. and the State" referred to in the correspondence were fully set out in Paragraph 28 of the 1961 lease as follows:

> "28. Condemnation. In the event that the entire Demised Premises, or so much thereof that the remainder is not useful to Tenant, be taken by condemnation or eminent domain during the Original Term of this lease, this lease shall terminate, and there shall be paid or turned over to Tenant, as or from the award for such taking, a sum calculated by multiplying the Tenant's Original Investment (as hereinafter defined) successively by two fractions: (1) a fraction whereof the numerator is the number of days between the date of the vesting of title and the date of expiration of the Original Term of this lease, and the denominator is the number of days in the Original Term, and (2) a fraction whereof the numerator is the then rental value immediately before such taking of the premises taken and the denominator is the then rental value of the entire Demised Premises immediately before such taking. Nothing herein contained shall require Landlord to pay to Tenant any sum in excess of the total award for such taking.
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> In the event of any other partial taking, this lease shall terminate only as to the part so taken, and the Fixed

Rent for the balance of the then current term shall be reduced by the fraction last above set forth, but Landlord shall, from its share of the total award or otherwise, bear the expense of the restoration to a rentable condition of the untaken balance of the Demised Premises.

As used herein, the phrase "Tenant's Original Investment" shall mean the total costs to Tenant of the improvements specified in Article 1 hereof, plus all expenses of Tenant incurred in connection therewith and capitalized by Tenant in accordance with good accounting practice.

If, at any time during the Original Term or any extended term hereof, the whole or any part of the Demised Premises or of the Building or of Tenant's interest under this lease shall be taken or condemned by any competent authority for temporary use or occupancy, this lease shall not terminate by reason thereof, and Tenant shall continue to pay in the manner and at the times herein specified, the full amounts of the rent and all additional charges payable by Tenant hereunder, and, except only to the extent Tenant may be prevented from so doing pursuant to the terms of the order of the condemning authority, Tenant shall continue to perform and observe all of the other terms, covenants, conditions and obligations hereof on the part of Tenant to be performed and observed, as though such taking had not occurred. In the event of any such

> taking, Tenant shall be entitled to receive the entire amount of any award made for such taking, whether paid by way of damages, rent or otherwise, unless such period of temporary use or occupancy shall extend beyond the expiration date of the Original Term of this lease or (in the event that the term hereof shall have been extended as hereinafter provided) of any extended term hereof, in which case such award shall be apportioned between Landlord and Tenant as of such date of expiration. The existence or possible continuation of any such period of temporary use or occupancy shall not affect the right of Tenant, as against Landlord, to exercise any of Tenant's options to extend the term of this lease."

In 1982, the State notified Bradley Facilities that it intended to condemn the leasehold interest prior to August 31, 1982 which date was the end of the original term of the lease. The plaintiff thereupon brought an action in the Superior Court in the Judicial District of Stamford at Norwalk (CV82 006 12 32S, Bradley Facilities, Inc. v. J. William Burns, Commissioner, DOT.). In that action, Bradley Facilities sought to

enjoin the Commissioner of Transportation from proceeding with the condemnation. While trial in that case was pending, the parties negotiated a settlement which resulted in a stipulation for judgment. Judgment, in accordance with the stipulation was entered by the court (Cioffi, J.) on August 17, 1982. A copy of that stipulated judgment is Exhibit K in this case.

According to the terms of the stipulation and judgment, the defendant State would continue with its plans to improve Bradley International Airport (which plans involve the demolition of the building occupied by Bradley Facilities) and the construction of a new passenger terminal as well as the construction of a substitute air cargo facility. The State agreed that it would not condemn Bradley Facilities' interest in the existing cargo facility until such time as a

substitute cargo facility of adequate size and operational configuration with associated aircraft ramp was constructed and ready for occupancy. Among other provisions, it was also further agreed that if the state exercised its right of condemnation, that condemnation would be deemed to have commenced on August 30, 1982 and during the Original Term of the 1961 lease as amended.

On April 2, 1984, the Commission of Transportation, acting pursuant to the authority of Sections 13b-42(e) and 13a-73 of the General Statutes filed with the clerk of the Superior Court in Hartford, a certificate of the taking of the plaintiff's interest in the subject property with notice to Bradley Facilities and an assessment of damages in the amount of $1.00. (Exhibit L) The certificate of taking noted that "The date of condemnation in this matter

shall be deemed to have occurred on August 30, 1982, as contained in a judgment dated August 17, 1982, (CV 82 006 12 32S) Superior Court, Judicial District of Stamford-Norwalk at Stamford." Plaintiff Bradley Facilities, Inc. appealed from the assessment of damages and for a reassessment thereof. The case was referred to the undersigned referee for all further proceedings, including hearing and judgment.

A decision in this case differs in a material aspect from decisions in the usual eminent domain case where on appeal from the assessment of damages, the decisive issue at trial is simply the fair market value of the property which as been taken. Wronowski v. Redevelopment Agency, 180 Conn. 579, 585. In the present case a preliminary issue to be decided is whether any damages owed to the plaintiff as a result of the taking are

to be determined by such a finding of the fair market value of the property or determined according to the provisions of paragraph 28 of the 1961 lease (Exhibit A) and the terms of the stipulation between the parties (Exhibit K) which was entered as a judgment of the Superior Court.

Two expert witnesses testified on the question of damages. Peter Marsele, an experienced real estate appraiser retained by the plaintiff, testified that, in his opinion, the leasehold estate which was taken in the condemnation proceedings had, at the time of the taking, a value of $1,066,000 and that is the amount of the damages which the plaintiff sustained as a result of the taking. The weight which can be given to this opinion is substantially reduced by two factors. The first is that in valuing the leasehold interest, the

witness did not limit the term of the lease (Exhibit A) to the "original term" which expired August 31, 1982 but included time from the two five-year options to renew despite the August 17, 1982 stipulation of the parties, (Exhibit K) that a subsequent condemnation of the leasehold interest "shall be deemed to have occurred on August 30, 1982 and during the Original Term of a certain lease agreement between the parties dated October 24, 1982, as amended". It is also to be noted that the witness testified that after discussion with plaintiff's counsel, he did not use or figure in considering damages, the provisions of Paragraph 28 of the lease, providing a formula for the determination of damages in the event of a taking by condemnation.

The other expert witness on damages as a result of the taking was Darrell Pastaska, a

Certified Public Accountant, called by the defendant. He is a senior manager in the auditing and accounting division of the accounting firm of Arthur Andersen & Co. He reviewed the relevant provisions of the lease between the parties (Exhibit A) with particular reference to paragraph 28 containing the agreed upon formula for compensation to the lessee in the event of a condemnation of the lease premises. He also reviewed Bradley Facilities' financial statements and tax returns relevant to its original investment and the application of the agreed upon formula for the ascertainment of damages. It was his conclusion from an accounting standpoint that computing damages pursuant to the formula provided in the lease resulted in finding the damages sustained by Bradley Facilities to be $146.38. (Defendant's Exhibit 6).

From all the evidence, it is concluded that the damages to which the plaintiff is entitled are governed by the provisions of paragraph 28 of the 1961 lease as amended and the terms of the stipulation agreed to by the parties. As computed by the witness Pastaska, they amount to the sum of $146.38.

The taking date having been August 30, 1982 and the damages assessed by the defendant having been $1.00, judgment is directed for the plaintiff in the amount of $145.38 with interest on that sum from the date of the taking to the date of payment together with costs and an appraisal witness fee of $3,000.

/s/
Charles S. House,
State Trial Referee

DOCKET NO. CV82 0061232S	:	SUPERIOR COURT
BRADLEY FACILITIES, INC.	:	J.D. OF STAMFORD/ NORWALK
vs.	:	AT STAMFORD
J. WILLIAM BURNS, ET AL.	:	AUGUST 17, 1982

STIPULATION

The parties hereby agree and stipulate as follows:

1. The defendants represent that the intended condemnation of the plaintiff's leased cargo facility (i.e. "horseshoe" building) and any future condemnation pursuant to paragraph three hereinafter set forth is predicated upon and results from the furtherance and implementation of the Bradley International Airport (B.I.A.) Improvement Program as set forth in the B.I.A. Master Plan of March 31, 1981, as may be revised

(specifically the construction of a passenger terminal complex and/or related air craft parking and maneuvering area, which necessitates the demolition of the "horseshoe" building) and further the defendants, their agents, servants or lessees will not start actual construction of a substitute air cargo facility until (a) revenue bonds are sold or (b) bond anticipation notes are issued (both (a) and (b) being pursuant to P.A. 81-406) or until general obligation bonds are authorized in order to implement the B.I.A. Plan.

2. The temporary restraining order presently in effect is hereby dissolved and the plaintiff agrees to withdraw this action requesting temporary and permanent injunctions.

3. The defendants agree that they will not condemn the plaintiff's leasehold in-

terest in the "horseshoe" building at B.I.A. until such time as a substitute air cargo facility of adequate size and operational configuration of not less than 60,000 square feet and associated air craft ramp have been constructed and are ready for occupancy.

4. If the State or named defendants exercise their rights of condemnation as set forth in the above paragraphs, such condemnation shall be deemed to have occurred on August 30, 1982 and during the Original Term of a certain lease agreement between the parties dated October 24, 1961, as amended. The plaintiff's agreement with said condemnation date shall not be deemed to be a waiver of any of its rights in connection with any condemnation award or acquiescence with or to the position of the State or defendant thereto.

5. If the plaintiff's leasehold interest in the "horseshoe" building is condemned in accordance with the above paragraphs, the parties agree as follows:

(a) The plaintiff waives interest from August 30, 1982 to the date of the filing of a certificate of condemnation on a condemnation appeal deficiency judgment;

(b) The plaintiff agrees not to contest the validity of the aforesaid condemnation;

(c) The defendants will give the plaintiff ninety (90) days notice as to the expected final completion date of the substitute air cargo facility; and

(d) The plaintiff agrees to vacate the condemned leasehold premises ("horseshoe" building) within ninety (90) days after the completion date of the substitute air cargo facility.

6. If the State or its agents or lessees construct a substitute air cargo facility in accordance with paragraph one above, the plaintiff will not impede or inhibit by legal actions the State or its agents or lessees from so constructing said facilities.

7. The plaintiffs waives and relinquishes its rights of exclusivity set forth in Article 37 of said lease between the parties dated October 24, 1961, as amended, in accordance with paragraph one above.

8. In the event the defendants condemn the plaintiff's leasehold interests for reasons other than those set forth in paragraph one above, the terms and conditions herein shall not affect, pertain or apply to the rights and/or remedies of either party with regard to such condemnation.

9. The parties will prepare a Fourth Amendment to the October 24, 1961 lease incorporating the terms of this Stipulation.

0-10/18/61

AGREEMENT OF LEASE

THE STATE OF CONNECTICUT

acting by the

CONNECTICUT AERONAUTICS COMMISSION,

Landlord

and

BRADLEY FACILITIES, INC.,

Tenant

Premises at Bradley Field,
Town of Windsor Locks,
Hartford County,
Connecticut

AGREEMENT OF LEASE

THIS INDENTURE made the 24th day of October, 1961, between the STATE OF CONNECTICUT, acting herein by the CONNECTICUT AERONAUTICS COMMISSION, through its Director of Aeronautics, hereunto duly authorized, in accordance with the provisions of Section 15-48 of the General Statutes of Connecticut, with the approval of the Attorney General and the Commissioner of Finance and Control, having an office, for the purposes hereof, at Brainard Field, Hartford, Connecticut (hereinafter called "Landlord"), and BRADLEY FACILITIES, INC., a Connecticut corporation having its principal office at Wilton, Connecticut (hereinafter called "Tenant"),

W I T N E S S E T H

In consideration of the several covenants and agreements hereinafter contained, Landlord does hereby let, grant, demise and lease unto Tenant and Tenant does hereby hire and take from Landlord, the particular premises shown outlined in red on the annexed copy (reduced in size) of a certain Site Plan made by Onderdonk & Lathrop, dated September 21, 1960, as last revised July 19, 1961, of a portion of the Airport known as Bradley Field, in the Town of Windsor Locks, County of Hartford and State of Connecticut (which particular premises so shown, with the building and improvements to be constructed thereon, are hereinafter called the "Demised Premises").

TO HAVE AND TO HOLD the Demised Premises unto Tenant for a term commencing on the

date hereof and expiring at midnight on the day before the 20th anniversary of the Commencement Date (as defined in Article 2 hereof) at the rents and upon the following covenants, conditions and agreements to all of which the parties consent; and each of the parties hereby expressly covenants and agrees to keep, perform and observe all the terms, covenants and conditions herein contained on its part to be kept, performed and observed:

1. Tenant to Construct New Building; Performance Bond. Tenant at its own cost and expense shall construct a building (hereinafter called the "Building"), and appurtenant apron, on the Demised Premises in accordance with the plans and specifications, made by Onderdonk & Lathrop, identified in Schedule "A" hereto annexed. Tenant shall also, at its own cost and expense, con-

struct, as and for the access road to the Demised Premises, the "Bituminous Treated Surface Gravel Road" shown leading to the Demised Premises on the annexed Site Plan. The Building, and the appurtenant apron construction, shall as constructed become the property of Landlord; upon the completion of construction, Tenant shall, upon the request of the Landlord, deliver to the Landlord an instrument quit-claiming to Landlord all interest of Tenant in the title to the Building and all appurtenant construction, subject, however, to this lease and the provisions hereof.

As to each prime contractor for such construction, Tenant shall provide Landlord with a Performance Bond (in which Bond Tenant may also be an insured) of a surety company duly authorized to do business in Connecticut, and such bond shall also comply

with Section 49-41 of the General Statutes of Connecticut.

Landlord at its own cost and expense shall, during Tenant's construction, construct on the Airport, adjacent to the Demised Premises, the concrete ramp, the black-top taxiways and the soil stabilization area shown on said Site Plan (which improvements are hereinafter called the "Landlord's Improvements").

2. Commencement Date; Other Definitions. As used herein, the phrase "Commencement Date" means the first of the month next ensuing the date on which the Demised Premises are available for occupancy, and the Landlord's Improvements are completed and ready for Tenant's use, as so certified in writing to the parties hereto by Onderdonk & Lathrop, architect-engineers.

As used herein, the phrase "Preliminary Term" means the period from the date hereof to and including the day before the Commencement Date.

As used herein, the phrase "Original Term" means the 20-year period from and including the Commencement Date to and including the day before the 20th anniversary of the Commencement Date.

As used herein, the phrase "term of this lease" includes (unless the context otherwise requires) the Preliminary Term, the Original Term, and any extended term of this lease.

....

28. Condemnation. In the event that the entire Demised Premises, or so much thereof that the remainder is not useful to Tenant, be taken by condemnation or eminent domain during the Original Term of this lease, this lease shall terminate, and there shall be paid or turned over to Tenant, as or from the award for such taking, a sum calculated by multiplying the Tenant's Original Investment (as hereinafter defined) successively by two fractions: (1) a fraction whereof the numerator is the number of days between the date of the vesting of title and the date of expiration of the Original Term of this lease, and the denominator is the number of days in the Original Term, and (2) a fraction whereof the numerator is the then rental value immediately before such taking of the premises taken and the denominator is the then rental value of the entire Demised

Premises immediately before such taking. Nothing herein contained shall require Landlord to pay to Tenant any sum in excess of the total award for such taking.

In the event of any other partial taking, this lease shall terminate only as to the part so taken, and the Fixed Rent for the balance of the then current term shall be reduced by the fraction last above set forth, but Landlord shall, from its share of the total award or otherwise, bear the expense of the restoration to a rentable condition of the untaken balance of the Demised Premises.

As used herein, the phrase "Tenant's Original Investment" shall mean the total costs to Tenant of the improvements specified in Article 1 hereof, plus all expenses of Tenant incurred in connection therewith and capitalized by Tenant in accordance with good accounting practice.

If, at any time during the Original Term or any extended term hereof, the whole or any part of the Demised Premises or of the Building or of Tenant's interest under this lease shall be taken or condemned by any competent authority for temporary use or occupancy, this lease shall not terminate by reason thereof, and Tenant shall continue to pay in the manner and at the times herein specified, the full amounts of the rent and all additional charges payable by Tenant hereunder, and, except only to the extent Tenant may be prevented from so doing pursuant to the terms of the order of the condemning authority, Tenant shall continue to perform and observe all of the other terms, covenants, conditions and obligations hereof on the part of Tenant to be performed and observed, as though such taking had not occurred. In the event of any such taking,

Tenant shall be entitled to receive the entire amount of any award made for such taking, whether paid by way of damages, rent or otherwise, unless such period of temporary use or occupancy shall extend beyond the expiration date of the Original Term of this lease or (in the event that the term hereof shall have been extended as hereinafter provided) of any extended term hereof, in which case such award shall be apportioned between Landlord and Tenant as of such date of expiration. The existence or possible continuation of any such period of temporary use or occupancy shall not affect the right of Tenant, as against Landlord, to exercise any of Tenant's options to extend the term of this lease.

....

32. Tenant's Options to Extend Term. Tenant shall have the right and option to extend the term of this lease for an additional period of five years from and including the 20th anniversary of the Commencement Date to and including the day before the 25th anniversary of the Commencement Date, provided notice of Tenant's exercise of such option be given to Landlord at least three months prior to the 20th anniversary of the Commencement Date. Such first extended term shall be on the same covenants, agreements, provisions and conditions as those herein set forth except as to Fixed Rent. If the parties do not otherwise agree on the Fixed Rent for such first extended term, then such Fixed Rent shall be at the then existing fair rental value for comparable premises and such fair rental shall be determined as follows:

Landlord shall designate a qualified and competent real estate appraiser, and Tenant shall designate a competent and qualified real estate appraiser, and the two appraisers so designated shall agree on a third one, and the three shall determine the then existing fair rental value for the Demised Premises, which fair rental value shall be the agreed-upon Fixed Rent for such extended term.

If Tenant shall exercise its option for such first extended term, Tenant shall also have the right and option to further extend the term of this lease for a second additional period of five years from and including the 25th anniversary of the Commencement Date to and including the day before the 30th anniversary of the Commencement Date, provided notice of Tenant's exercise of such option be given to Landlord at least three

months prior to the 25th anniversary of the Commencement Date. Such second extended term shall be on the same covenants, agreements, provisions and conditions as those herein set forth except as to Fixed Rent. If the parties do not otherwise agree on the Fixed Rent for such second extended term, then such Fixed Rent shall be at the then existing fair rental value for comparable premises and such fair rental shall be determined as follows: Landlord shall designate a qualified and competent real estate appraiser, and Tenant shall designate a competent and qualified real estate appraiser, and the two appraisers so designated shall agree on a third one, and the three shall determine the then existing fair rental value for the Demised Premises, which fair

rental value shall be the agreed-upon Fixed Rent for such extended term.

...."

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JUL 11 1989
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CLERK

(3)

No. 88-1852

In The

Supreme Court Of The United States

OCTOBER TERM, 1988

BRADLEY FACILITIES, INC.,
Petitioner,

v.

J. WILLIAM BURNS, COMMISSIONER OF TRANSPORTATION FOR THE STATE OF CONNECTICUT,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

Submitted By:

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No. 88-1852

In The

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OCTOBER TERM, 1988

BRADLEY FACILITIES, INC.,
Petitioner,

v.

J. WILLIAM BURNS, COMMISSIONER OF TRANSPORTATION FOR THE STATE OF CONNECTICUT,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

The respondent, J. William Burns, Commissioner of Transportation for the State of Connecticut, prays that a writ of certiorari, as requested by the petitioner, Bradley Facilities, Inc., not be issued to review the judgment of the Connecticut Supreme Court rendered on December 27, 1988.

STATEMENT OF THE CASE

This case involves the condemnation by respondent, under the power of eminent domain, of the petitioner's remaining leasehold interests in premises leased to the petitioner by the respondent, and the fixing of condemnation damages by using the formula prescribed in the lease agreement, between the parties, for the calculation of such damages. The respondent, acting in the name of the State of Connecticut, filed a statement of compensation and served notice upon the petitioner pursuant to Connecticut General Statutes, Sections 13a-73 and 13b-42(e) (Pet. 5),* condemning petitioner's leasehold interest at Bradley International Air Terminal, and setting the amount of damages at a nominal amount of $1.00. (Ex. L)

The petitioner, pursuant to Connecticut General Statutes, Section 13a-76 (Pet. 4), appealed to the Superior Court for a reassessment of the $1.00 damages. The reassessment appeal was, as required by Section 13a-76 (Pet. 4), referred to a State Trial Referee, and the matter was assigned to the Honorable Charles S. House for hearing, decision, judgment, and all further proceedings including matters pertaining to any appeal therefrom. (35A) A trial was held on September 3, 1986, February 3, 1987 and March 10, 11, 1987, after which the State Trial Referee rendered judgment in favor of the petitioner and raised the award from the nominal $1.00 to $146.38, which was the amount calculated by a certified public accountant in accordance with the provisions of paragraph 28 of the lease agreement (Pet. 40a, 50a, 51a, 52a, 66a).

The petitioner appealed the judgment of the Superior Court to the Connecticut Appellate Court, and the appeal was removed to the Connecticut Supreme Court, on its own Motion. The required briefs were filed and extensive argument was heard during which the Supreme Court Justices

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* (Pet. — Petition for A Writ Of Certiorari to the Connecticut Supreme Court in this case.)

vigorously questioned both counsel on the legal application of the facts found at trial. The transcript of that hearing is produced in the Appendix. (1A)

Petitioner, at page 9 of the Petition, correctly states the law in Connecticut:

> "It is a fundamental principle of law that the power to appropriate private property for public use is an attribute of sovereignty and essential to the existence of government. 1 Nichols, Eminent Domain (3rd Ed.) §§ 1.14, 3.1; Am. Jur. 635, § 7. It attaches to every man's land and is paramount to his right of ownership. It lies dormant in the state until set in motion by legislative enactment." *Northeastern Gas Transmission Co. v. Collins*, 138 Conn. 582, 586, 87 A.2d 139 (1952). (Citations omitted) (22A)

However, petitioner neglected to continue the statement of law in *Northeastern Gas, supra*, 587, which states, "The legislature itself may exercise the power or may delegate that right to another." (This principle of law was stated by the Connecticut Courts as far back as 1847 in *Clark v. Saybrook*, 21 Conn. 313.) (21A, 36A) Consequently, the petitioner incorrectly stated at page 9 of the petition that, "At the time the State entered into its lease with petitioner, and continuing through 1981, the State did not have authority to condemn its own leases for airport land." The State, as the sovereign, always had the inherent right to condemn leasehold interests, whether for airport land or otherwise. (25A) A Connecticut case exactly on point (Pet. 24a), where a leasehold was condemned by the lessor was decided in 1941. See *Town of Danbury v. Danbury Airport Corporation*, 9 Conn. Sup. 319, 321. (22A, 37A)

Furthermore, at the time the lease contract between the parties was executed, the State had the statutory authority to condemn leasehold interests under the provisions of Connecticut General Statutes, Section 15-79 (34A), which stated in pertinent part:

> "The State . . . may establish, maintain and operate an airport at any location within the State . . . and

may take any such land *or interest therein* for such establishment or for the expansion or improvement of an airport . . . upon paying just compensation to the owner of such land *or interest therein* . . . ." (Emphasis added)

The Connecticut Legislature did not delegate the power to condemn leasehold interests in airport land to the Commissioner of Transportation until July 1981 when Public Act 81-421 (Section 13b-42(e)) (Pet. 5) became effective. However, the Legislature could have exercised that power, at any time, by enacting a Special Act for that particular purpose. (21A)

The Connecticut Legislature, by enacting Public Act 81-421 (Senate Bill 1425), merely decided it would be administratively expedient and extremely cost effective, in an era of rapidly rising prices, to grant authority to the Commissioner of Transportation to condemn leasehold interests in the same manner as the Commissioner had for the condemnation of a fee simple. State Senator Thomas Serrani, Co-Chairman of the Connecticut Senate and House Joint Transportation Committee, in addition to the comments presented by the petitioner at pages 10–11 of its petition, stated:

"Right now we have some major time delays in certain projects dealing with transportation particularly in the area of airport expansion . . . . This bill . . . would cut down on some of the paper work . . . . As you know, with inflation as it is today some of these major projects would turn in millions of dollars by being delayed for a month . . . . (I)t's important that we move quickly on all of these projects and the Department of Transportation is well equipped to do this as they have been doing for many years in the highway and bridges area . . . ." (41A)

"The Finance Committee here in the General Assembly has passed one hundred million dollars bonding authorization for the completion of the

Bradley master plan and that Department wants to move ahead with this program. . . ." (41A)

Senator Serrani reiterated his comments the following day and again emphasized the saving of millions in the Bradley Terminal expansion project costs. (42A, 43A) In further discussion of the Bill, Senator Serrani stated that the reason legislation was needed was, "I think *the intent is there* but it is unclear of that understanding, and therefore, that's why the legislation, the amendment is before us. . . ." (Emphasis added) (43A)

State Representative John T. Pier, the other Co-Chairman of the Senate and House Joint Transportation Committee, also clearly indicated the legislative intent in enacting Public Act 81-421 when he stated to the House:

". . . It is keyed primarily to *enabling legislation* for the expansion and development of Bradley International Airport but also affects other major transportation facilities and the like. . . ." (Emphasis added) (44A)

"(W)hat it provides is the authority to the Commissioner of Transportation to condemn leaseholds in the same basis as any other property interest at an airport facility. . . . *It is simply enabling legislation* to make it very clear that the state has the authority to condemn the leases. It's *probably already true in the law* but there is some question at whether it would have to go to litigation. . . ." (Emphasis added) (44A, 45A)

Finally, at the Joint Transportation Committee hearings the then Commissioner of Transportation, Arthur B. Powers, stated that the Bill would enhance the speedy and orderly development of Bradley International Air Terminal. (46A) Therefore, the petitioner is clearly in error in the claim made at page 10 of the petition that, "There can be no question

that the legislation enacted, Connecticut General Statutes, Section 13b-42(e) (Public Act 81-421) was directed *solely* to petitioner's lease and was *intended* to change the existing rights between the petitioner and the State by affording the State a previously *non-existent* right to condemn petitioner's leasehold interest. . . ." (Emphasis added) The State always had that right and the legislation was a public act, not a special act, and it affected all leases at airport facilities.

Petitioner also claims that respondent had "set aside" one million dollars to pay for petitioner's leasehold interest, and offers a reference to the trial transcript as proof of that fact. (Pet. 9–10) Petitioner again makes a statement of fact without proper or adequate foundation. The transcript reference is to testimony of petitioner's president, Daniel J. McCauley (Tr. Sep. 3, 1986, 2), and McCauley would have no direct knowledge of respondent's intent or financial plans and procedures. Significantly, petitioner did not introduce any substantiating documentation to prove its claims even though petitioner had ample time and opportunity to secure that documentation from the respondent, through discovery procedures, if, in fact, such documentation existed. The exhibit reference (Ex. J) indicates there was an estimate of possible costs made and no one ever offered documentation of a commitment or obligation of funds would have been necessary to "set aside" monies for any particular expenditure. An estimate of costs does not, in any way, "set aside" funds or establish liability.

Petitioner states (Pet. 12) that as part of the stipulation (Pet. 53a) signed by the petitioner and respondent to conclude the injunction action in 1982, petitioner expressly provided that ". . . (I)ts rights in connection with any condemnation award . . ." were not waived. Petitioner asserted every right it had in the condemnation and nothing was waived by the petitioner or taken away by the respondent. Petitioner had the right under the Federal and State Constitutions to receive just compensation for the taking of its property. Petitioner was paid $1.00 nominal damages (Ex. L) by respondent.

Petitioner asserted its right in accordance with General Statutes, Section 13a-76 (Pet. 4) to appeal that nominal award to the Superior Court and to be heard on the issues. After an extensive trial, the Superior Court found that the lease contract clause, paragraph 28 (Pet. 52a, 66a), applied and damages should be calculated in accordance with the terms of paragraph 28. Accordingly, the state referee raised the damages to $146.38. Petitioner was not pleased with the judgment of the Superior Court, and asserted its right to appeal that judgment to the Connecticut Supreme Court. Now the petitioner is asserting its right to petition this Court to have the Connecticut courts' decisions reviewed.

Finally, petitioner claims (Pet. 14–19) that Article 28 (paragraph 28 of the lease agreement) should not have been used by the court to establish the "just compensation" for the taking of petitioner's leasehold interest. Petitioner relies on three arguments:

1. Article 28 could only apply to a taking by the Federal Government. (Pet. 15, 16, 17)

2. The "entire demised premises" were not taken and the second portion of paragraph 28 should apply. (Pet. 15)

3. Officials of respondent represented to the Connecticut Legislature that the lease agreement contained no understanding concerning condemnation of petitioner's leasehold interest. (Pet. 13)

Petitioner argues that paragraph 28 could only apply to a Federal taking and relies on the sharing provision in the paragraph. However, the telling language in the paragraph is, "(T)here shall be paid or turned over to Tenant, as or from the award." (Pet. 66a) Extracting from the quote, "(T)here shall *be paid* . . . to Tenant *as* . . . the award." That language can only be applicable if the State condemns the petitioner's leasehold interest. The remaining language,

"(T)here shall be . . . turned over to Tenant . . . from the award," can only be applicable if the Federal Government, or other third party, condemns the fee and paid damages to the respondent and respondent would "turn over" a portion of the award calculated in accordance with the provisions of paragraph 28. (32A, 33A) (Pet. 18a, 19a) It should be noted that damages would still be the unamortized value of the leasehold improvements ($146.38) in either case. (28A, 29A, 31A, 32A) Petitioner also relies on three documents composed by an attorney who was transportation counsel from 1978 to 1983. (Tr. Sep. 3, 1986, 110) These documents were introduced as Exhibits O, P, Q and were simply one individual's analysis of the language contained in paragraph 28. (25A, 26A) The Connecticut Supreme Court concluded that the construction of the lease by this official was erroneous. (Pet. 28a, 29a)

The meaning of the term "demised premises" is clear and unambiguous. The leased premises are identified at p. 1 of the lease (Ex. A) (Pet. 61a) (23A) as follows:

> ". . . Landlord does hereby let, grant, *demise and lease* unto Tenant and Tenant does hereby hire and take from Landlord, *the particular premises shown . . . (which particular premises so shown, with the building and improvements to be constructed thereon, are hereinafter called the 'Demised Premises')*. . . . TO HAVE AND TO HOLD *the Demised Premises* unto Tenant for a term. . . ." (Emphasis added)

This language indicates the parties' intent to define the leasehold interest as the "demised premises." The purpose in using this defined term was simply to identify the premises demised or leased to Bradley and taken by respondent. (See Pet. 13a-19a)

The second portion of paragraph 28 (Pet. 68a) cannot apply to the facts in this condemnation. The language in the

second portion refers to "temporary use or occupancy" and the lease shall not terminate. (Pet. 68a) The condemnation was not for temporary use or occupancy and the lease did terminate, therefore, the second portion of the paragraph is not applicable. (23A)

A review of the entire text of the testimony of Commissioner of Transportation, Arthur B. Powers, before the Joint Transportation Committee does not indicate the respondent represented to the Connecticut Legislature that the lease did not contain an understanding concerning the condemnation of petitioner's leasehold interest. (46A)

REASONS FOR NOT GRANTING THE WRIT

I. THERE WAS NO IMPAIRMENT OF THE STATE'S CONTRACTUAL OBLIGATIONS AND NO REVIEW IS APPLICABLE UNDER THE CONTRACTS CLAUSE OR THE TAKINGS CLAUSE.

Petitioner suggests this case presents an unresolved question applicable to a state's assessment of compensation for the taking of a right under a contract to which the state is itself a party. (Pet. 20) Petitioner is incorrect. There was no right taken under a contract by the State of Connecticut in this case. The State had the inherent power, under eminent domain, to take petitioner's leasehold interest. The State also had the right under the lease contract to calculate the damages in accordance with the contract and to pay to the petitioner, "as the award," the unamortized value of the leasehold improvements. Petitioner and respondent agreed in advance that, in the event of a condemnation, petitioner's award would be calculated pursuant to a prescribed formula. (Pet. 66a)

Such lease provisions are referred to as "condemnation" or "termination" clauses and are widely recognized as valid. Annotation, *Validity, Construction and Effect of Specific Provision of Lease or Statute Relating to Rights and Compensation of Lessee in Event of Condemnation*, 96 A.L.R.2d 1140 (Rev. 1987). Connecticut has adopted this reasoning and has clearly held that such a provision, which specifies the rights of the parties with regard to the condemnation award, is enforceable *according to its terms.* (Emphasis added) *Waesche v. Redevelopment Agency of the City of New London*, 155 Conn. 44, 50, 229 A.2d 352 (1967) citing 27 Am. Jur. 2d 22, Eminent Domain § 250; note 96 A.L.R.2d 1140, 1145 § 4; 11 McQuillin, op. ed. § 32.85, p. 465.

The Connecticut Supreme Court adopted this reasoning in this case (Pet. 35a, 36a), and further held:

"However inadequate the amount arrived at through the formula might appear in the absence of such an agreement an award made pursuant to the agreement cannot be regarded as an impairment of a contract." (Pet. 35a)

Furthermore, petitioner not only agreed to provisions contained in paragraph 28 when the original lease was executed, but during the term of the original lease there were at least three amendments agreed to and there is no indication that petitioner sought to have the language in paragraph 28 changed or modified. (Ex. C, D, G) (Tr. Sep. 2, 1986, 10, 12, 26) In addition, petitioner signed another agreement with respondent in the form of a Stipulation (Pet. 53a) in 1982, over a year after the change was made to General Statutes, Section 13b-42(e) (Pet. 5) (22A, 23A), which agreement triggered the operation of paragraph 28 when petitioner agreed with respondent that the date of the anticipated condemnation would be deemed to be August 30, 1982 — a date which would bring the condemnation within the initial term of the lease. (Pet. 11, 12, 55a) (23A) It is interesting to note that at the time the Stipulation was signed, respondent was represented by an attorney and the president of the petitioner, Daniel J. McCauley, was also an attorney-at-law and a member of the bar of New York State. (Tr. Sep. 2, 1986, 2)

Finally, this Court has jurisdiction under the impairment clause only when the state court has given effect to a legislative enactment which impairs the obligation of a prior contract. *Winona & St. Peter Railroad v. Plainview,* 143 U.S. 371, 392, 12 S.Ct. 530, 36 L.Ed. 191. The judgment of the state court must rest on the statute either expressly or by necessary implication. *New Orleans Waterworks Co. v. Louisiana,* 185 U.S. 336, 350, 22 S.Ct. 691, 46 L.Ed. 936. No such conditions exist in the present case. The state trial court relied on the condemnation clause (paragraph 28) of the original lease contract and the stipulation agreement, signed by the parties, to assess just compensation for this taking. (Pet. 52a) The petitioner has no claim under the contracts impairment clause.

II. THE COMPENSATION AWARDED PETITIONER BY THE STATE WAS THE COMPENSATION REQUIRED UNDER THE LEASE AGREEMENT AND THE STIPULATION SIGNED BY THE PARTIES AND ACCORDINGLY IS NOT PATENTLY INADEQUATE.

The State's conduct here was in accordance with the provisions of the two agreements signed and executed by the petitioner along with the respondent. Petitioner cannot now claim harm when the calculation of the compensation was previously agreed to. Furthermore, with all the arguments made by petitioner, if a condemnation occurred during the original term of the lease, paragraph 28 would dictate the amount of compensation petitioner would receive regardless of which agency condemned the leasehold. (29A, 31A, 32A) (Pet. 17a, 36a) Petitioner agreed in the stipulation (Pet. 55a) that the condemnation would occur during the original term of the lease, and therefore, petitioner triggered the operation of paragraph 28. Petitioner cannot now claim the award is inadequate, fundamentally unfair and violates the Takings Clause and the Fifth and Fourteenth Amendments. (Pet. 31a, 35a)

This Court has consistently refused to consider claims that condemnation awards are inadequate. *O'Brien v. Public Service Commission*, 251 U.S. 537, 40 S.Ct. 55, 64 L.Ed. 402; *Puget Sound Traction, Light & Power Co. v. Newell*, 246 U.S. 649, 38 S.Ct. 315, 62 L.Ed. 920; *Sioux County v. Rule*, 241 U.S. 640, 36 S.Ct. 285, 60 L.Ed. 1216; *Consolidated Turnp. Co. v. Norfolk & O.V.R. Co.*, 228 U.S. 326, 33 S.Ct. 510, 57 L.Ed. 857, *Glos v. Chicago*, 226 U.S. 599, 33 S.Ct. 112, 57 L.Ed. 375.

CONCLUSION

The award of compensation for this taking was made in accordance with the terms of two agreements executed by petitioner with respondent. Petitioner entered into these agreements freely and without undue influence. When the stipulation was agreed to, the General Statute, which petitioner claims was enacted to impair the contract petitioner had with the State, was passed by the state legislature more than a year before the Stipulation was signed. Petitioner was represented by an attorney and one of the officials of the petitioner was also an attorney when the stipulation was signed. When the original lease contract was signed, a careful reading of paragraph 28 would have indicated that the State's taking of the leasehold was contemplated. Intent of the parties is determined by the language used in the agreement. Accordingly, petitioner was bound to its agreement of the August 30, 1982 condemnation date, which, in turn, required the computation of damages in accordance with paragraph 28.

There is no foundation for this Court to assume jurisdiction in this matter. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 88-1852

In The

Supreme Court Of The United States

OCTOBER TERM, 1988

BRADLEY FACILITIES, INC.,
Petitioner,

v.

J. WILLIAM BURNS, COMMISSIONER OF TRANSPORTATION FOR THE STATE OF CONNECTICUT,
Respondent.

APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

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DOCKET 13458 : STATE OF CONNECTICUT

BRADLEY FACILITIES INC. : SUPREME COURT

VS

J. WILLIAM BURNS, COMMISSIONER OF TRANSPORTATION, ET AL : OCTOBER 14, 1988

ARGUED BEFORE:

THE HONORABLE ROBERT J. CALLAHAN
THE HONORABLE ARTHUR H. HEALEY
THE HONORABLE T. CLARK HULL
THE HONORABLE DAVID M. SHEA

APPEARANCES:

FOR BRADLEY FACILITIES INC.:
WILLIAM LAPINE, ESQ.
THOMAS CASONE, ESQ.

FOR J. WILLIAM BURNS, ET AL:
MICHAEL J. LOMBARDO, ESQ.

MR. LAPINE: May it please the Court, I'm Lawrence Lapine. With me is Thomas Casone. We represent the Plaintiff Appellant, Bradley Facilities, Inc.

This is an appeal from a condemnation appeal, quite a unique appeal since the condemning authority in this instance and the landlord of the leasehold which was condemned are one in the same, the State of Connecticut.

Bradley Facilities, Inc. is a consortium of air freight carriers. The corporation was formed expressly for the purpose of constructing an air freight facility at Bradley International Airport in 1961. My client entered into a lease with the State of Connecticut and did construct an air freight

facility in 1962. The lease was to run twenty years from the date of completion, into 1982. It also carried with it two five-year options to extend that lease at an unspecified sum of money.

In 1975, the parties amended the lease. The Plaintiff in consideration of releasing some land that was under the lease, received a specified sum in rental for the two five-year option periods.

In 1985 (sic), the State of Connecticut was undergoing or considering an expansion project at the airport and determined that they would need the air freight facility of my clients. They would have to demolish it in order to make room for the expansion.

They determined around '79, in looking at the lease, that there was a condemnation clause in the lease, Article 28. The State determined —

JUSTICE HEALEY: Who drew that lease, sir?

MR. LAPINE: The State of Connecticut drew the lease.

The State determined, the DOT determined or believed that there was a condemnation — the formula in the condemnation clause would afford the State of Connecticut the ability to take a leasehold a pay us a minimum amount of damages, if any.

However, they also concluded that the State did not have the statutory authority in 1981, or, since 1961, to condemn its own leasehold interests and then, unbeknownst to us, went to the Legislature and drafted and lobbied and eventually succeeded in getting fourteen — I'm sorry — getting the condemnation provision 13b-42e passed, which afforded them the opportunity to condemn their leasehold interest.

In 1982 or 1981, they notified us that they intended to condemn the property within the original term of the lease. We sought an injunctive action in the Superior Court in Stamford on the basis that the State had no need for our building at that time, and, in fact, the only reason why they intended to condemn the leasehold interest in 1982 was an attempt to bring it within this formula in Article 28 of the condemnation clause.

JUSTICE CALLAHAN: Excuse me, Mr. Lapine. Was there any provision in the lease for a total taking during the option periods?

MR. LAPINE: Addressing the total taking during the option period? No, there was not. Of the demised premises, no, there was not.

We stipulated in Stamford to the effect, among other things —

JUSTICE SHEA: There was a provision or it was simply a very standard condemnation clause, I understand.

MR. LAPINE: Absolutely.

JUSTICE SHEA: In other words, it didn't actually, obviously, authorize any action by itself, you'd have to have a statute. Is that right?

MR. LAPINE: Yes. The condemnation clause was a standard condemnation clause between a landlord and a tenant and —

JUSTICE CALLAHAN: Apportioning damages.

MR. LAPINE: Excuse me?

JUSTICE CALLAHAN: Apportioning damages.

MR. LAPINE: Apportioning the award of the damages. It didn't fix damages, it apportioned sharing of the damages.

JUSTICE SHEA: Let me ask you one thing. 13b-42e, the statute you previously referred to, was that enacted before or after the exercise of the options?

MR. LAPINE: It was enacted after the exercise of the option. It was enacted shortly before they notified us of the condemnation. The options were exercised in 1979. The statute, I believe, was created in — 42e — was in 1981. And that statute was enacted specifically addressed to these two lease — to the lease of Bradley Facilities, Inc.

We had stipulated in Stamford that the condemnation, the injunction action would be dropped, the State would not proceed with its condemnation —

JUSTICE HEALEY: Excuse me. When you say it was enacted specifically with reference to the facilities at Bradley, was this a general statute or a special act?

MR. LAPINE: No, it was a general statute, but the legislative history clearly shows and the Defendants admit —

JUSTICE HEALEY: That that was the only purpose.

MR. LAPINE: — that was the purpose. That was the sole purpose, this leasehold —

JUSTICE HULL: The Commissioner came in and said they needed this, didn't he? Commission of Transportation, as I recall?

MR. LAPINE: Yes, came in and said they needed this statute because of Bradley Facilities, Inc. lease.

The stipulation stated that if the State did condemn, that we would agree that they could use as a condemnation date

August 31st, 1982, so they can make their argument about the applicability of the formula.

That's all we stipulated to, and, in fact, stated that we were not waiving any of our rights to an award and that we were not agreeing with or acquiescing to the State's position as to damages. As we felt in 1982, it came to pass that they did not need the property until 1984 and it was July, 1984 that we vacated. It was July, '84, or, April, '84 that the notice of condemnation —

JUSTICE HULL: Wasn't that one of your purposes in the stipulation, to get a couple more years of possession of the facilities?

MR. LAPINE, Not exactly, Justice Hull. Our major objective was we didn't think — they didn't have the funding in 1982. We thought that they may not need, they may not get to the position where they needed our building. Obviously, we knew we would get a couple more years, but we felt, number one, that it may not come to pass, and, quite strongly, number two, is that we didn't agree with the State's position at all with regard to damages. We didn't agree in 1982 we didn't agree at the trial level, and this is the basis of our argument before this Court, is that we do not feel that the condemnation clause even applies. Firstly, because the condemnation clause doesn't set an award. It's only because the State is a landlord that they can make the argument. But a condemnation clause is the sharing of the award, not the setting of the award.

And I should state that in 1984, the facility was fully rented. We were grossing three hundred thousand dollars a year. We were netting two hundred and twenty-five thousand dollars a year and we had eight years left to run.

That lease wasn't worth a dollar or worth a hundred and forty-five dollars; it was worth a million dollars and the State knew it and their own documents showed it. They had set aside a million dollars for this lease.

So, the formula in Article 28 of the lease is contrary to the long-standing rule of this Court of how do you set damages for the condemnation of a leasehold interest. Actually, it's how do you set damages when you determine how much a tenant can share in the fee owner's condemnation award and it's the economic rent less the contract rent and that difference times the number of years left to run on the lease. That's how you determine damages of a leasehold interest.

So, our first argument is, and at the trial level, is this article in the lease, is it relevant for this hearing? Because that isn't how you set damages. As in the Giglioti (phonetic) case and the Barini (phonetic) case, this Court clearly established how you set damages.

If the State claims that they can share in our leasehold interest, they can go under 48-21, which is a separate hearing where the Court determines the division between the condemnation award.

So, we said, Well, I don't see how the State can claim they can share in our award for a leasehold interest, but if they make that claim then it should come at the appropriate time. This is a million dollar lease; make the award for a million dollars and then let the State move to see if they can share in that award.

Even if you get beyond that, though, the clear reading of the condemnation award shows — the condemnation clause — shows that it doesn't apply in this case. First off, the condemnation clause addresses a number of situations that can exist. The State hung it's hat on a formula —

JUSTICE HULL: Page, please? Can you refer me to —

MR. LAPINE: Page of the lease? It is —

JUSTICE HULL: I mean of what we have before us so I can look at what you're talking about.

MR. LAPINE: All right, Your Honor. In the record, it's page twenty-one.

What the State saw in 21 is the term, the original term of the lease. I think what they overlooked were the first words, "In the event that the entire demise premises were taken by condemnation." The demise premises have not been taken by condemnation —

JUSTICE SHEA: When you take the lease, isn't that the entire demised premises?

MR. LAPINE: No, it's —

JUSTICE SHEA: Isn't that a reasonable interpretation?

MR. LAPINE: No, it isn't and I will tell Your Honor why. It's because there is a — number one, there is a provision in the lease, if you'll go to the last paragraph on page three starting with, "If at during the original term of the lease or extended, the whole or part of the demise premises or of the building or of the tenants' interests is taken temporarily by condemnation."

So, the lease itself, Justice Hull, distinguishes between demise premises and the tenant's interests, as does the law. The cases state the demise premises means the fee interest and that was our point at the trial level. The demise premises are owned by the State. After the condemnation of a leasehold interest, it's still owned by the State and the formula further points that out because the formula, one of the points of the formula is, what the formula consisted of is you take the tenant's improvement, cost of improvement, cost of putting up the building, and then you multiply it by two fractions, one of which is the time left on the lease over the amount of days in the original lease. But, the words are, the time that title vests.

No title vested in this condemnation because if you read the — again, the opening sentence, it says in the event there's a condemnation of the demise premises, the lease terminates. So, how could —

JUSTICE HULL: Why can't you read demise premises and, not in a physical sense, but as referring to the leasehold interest?

MR. LAPINE: Can you read it in that fashion?

JUSTICE HULL: Why doesn't demise premises mean simply the leasehold interest of the tenant that is being condemned?

MR. LAPINE: Well, I'm saying it does not in this instance, and I would say in any instance, because a leasehold interest is the right to use the demise premises. It isn't the demise premises, number one, and the whole concept of this clause as in any condemnation clause in a lease, is to limit the tenant's sharing when the owner loses his property by condemnation. That's the purpose. The owner wants the entire award or wants at least a defined set of the award, to limit the tenant's interest. That's the purpose of this condemnation clause.

The State of Connecticut didn't lose anything in this condemnation. They still own the property, both before and after the condemnation. They hadn't suffered any damages.

And if one — if you continue with the paragraph I jumped to, Justice Hull, it's —

JUSTICE HULL: And what page is that on?

MR. LAPINE: It's the same one, page three, we're back to where that paragraph that I said distinguished the demise premises from the tenant's interest, that portion of the condemnation clause provides that if the tenant's interest is

taken, then the tenant's obligation to the State continues, that is, to pay rent, but the tenant gets the entire award. Which, it makes sense, because, again, the landlord hasn't lost anything. The landlord continues to get the benefit of the lease bargain, that is, his rent, while the tenant who's lost the leasehold interest, gets the entire award.

So, the State, or the landlord in this instance, is not damaged. And, so, the condemnation clause, if you apply it at all, takes into consideration the fact that if a leasehold interest is taken, it's the tenant and not the landlord that gets the award, provided the landlord's rent continues to be paid.

JUSTICE CALLAHAN: That whole section of the lease would not apply at all if the State of Connecticut was the condemnor, right?

MR. LAPINE: If they — they are the condemnor —

JUSTICE CALLAHAN: I know. But that section of the lease doesn't make sense if the State of Connecticut is the party who is doing the condemnation.

MR. LAPINE: Absolutely. It doesn't make sense at all. If you just read the language of it and —

JUSTICE CALLAHAN: And yet it seems to follow along with the first part of the — the first part of the lease and there doesn't seem to be any radical shift in gears between the first section of the lease and the second section.

MR. LAPINE: Of the condemnation clause?

JUSTICE CALLAHAN: Of the lease. There doesn't seem to be any — in other words, what I'm saying is the second section of the lease, at the bottom of page three here, doesn't make any sense if the State of Connecticut is the party who is doing the condemnation. Is that right?

MR. LAPINE: Well, it does make sense. Whoever the condemning party is, it does make sense, whether the State is the condemning party or the landlord. That's the problem, you have to make a distinction.

JUSTICE CALLAHAN: Yes, but in that situation the State wouldn't get the entire award, they'd be giving the award to themselves is what I'm saying. If you were going to write the condemnation clause intending it to be read the way the State wants it read in this situation, you would not have this clause in here.

MR. LAPINE: Exactly.

JUSTICE CALLAHAN: And there doesn't seem to be any radical shift of gears between the first part of the section of the lease and this part.

MR. LAPINE: Because it was never intended that the State would be the condemning authority.

JUSTICE HULL: Wouldn't you agree that it is at least ambiguous on this fundamental question that you and Justice Callahan are now discussing? It's at least ambiguous?

MR. LAPINE: I'd state it isn't ambiguous.

JUSTICE HULL: You think it's crystal clear?

MR. LAPINE: For two reasons. Number one, the lease has to be read in light of the law that exists at the time it was entered into. That's Black letter law, that the law of the land is incorporated as part of the lease. The law of the land —

JUSTICE HULL: Isn't that the most fundamental nitty gritty issue in the case?

MR. LAPINE: I think you can take any one of these, Justice Hull, and I find it fundamental and nitty gritty. I think

it's ironic because we can make any one of those arguments, that the law of the land at the time the lease was entered into, the State couldn't condemn.

JUSTICE HULL: All right, what's the other one? You said there were two reasons it's so clear; I don't want you to lose your train of thought.

MR. LAPINE: Just reading the condemnation clause. If you say, okay, there was, there was the law of the land, if you read the condemnation clause, it doesn't work. The formula doesn't work. The one section that does work is when it says the tenant's interests is taken. That works very well because that's what happened here and the State doesn't share in it. But, for nineteen years, during the course of this lease, the State didn't have a right to condemn its own leasehold interest. It was intended for a Federal takeover. The State of Connecticut knew it was intended for a Federal takeover. There are memorandums that preceded the —

JUSTICE HULL: They're not part of the record, are they?

MR. LAPINE: They're exhibits.

JUSTICE HULL: Are they?

MR. LAPINE: Yes.

JUSTICE HULL: There was an evidentiary hearing on this question of intent, on the question of whether or not there was some contemplation that this clause would be limited to a Federal condemnation, was there? In other words —

MR. LAPINE: It came out at an evidentiary hearing. One of our claims was, is that this is totally inequitable to being with because the State knew it was pertaining to a Federal takeover. So, that intent did come out; maybe not in the context of what was the intent of the section, but there are

memorandums from the Department of Transportation counsel to the various —

JUSTICE SHEA: Justice House didn't find that that was the intent, that it was to be a Federal condemnation, did he?

MR. LAPINE: I don't think Justice House addressed it, Your Honor.

JUSTICE SHEA: So it's not a fact in the case before us, even though there are memoranda in existence. The facts are only something found in the case, admitted or judicially noticed.

MR. LAPINE: Well, I agree with that. We asked for a rectification —

JUSTICE SHEA: And what happened? I can't remember.

MR. LAPINE: The only thing that Judge House rectified was he admitted that all the arguments that we're raising before this Court and in our brief was raised at the trial level. We asked for —

JUSTICE HEALEY: He said that all the claims of law you said you made below, you made before him.

MR. LAPINE: Yes.

JUSTICE HEALEY: That's all.

MR. LAPINE: Right. But we also — the rectification is in — our request for it is on page 31 and specifically it —

JUSTICE SHEA: C? 1-C?

MR. LAPINE: Thirteen, page 34, where we say that the Defendants knew that the condemnation provision pertained to a Federal condemnation.

JUSTICE SHEA: And what'd he do with that?

MR. LAPINE: He didn't include any of our request of facts in it. You'll see, there are three exhibits and those exhibits, every one of those exhibits say from the counsel of DOT that this provision was intended to address a Federal takeover, and said — otherwise the language doesn't make sense, and that at the same time, those memorandums also say, we don't have the legislative authority to condemn our leasehold interest, so let's go get it.

JUSTICE SHEA: But aren't we stuck — I don't mean stuck — aren't we bound by Justice House's finding and failure to act on the rectification?

MR. LAPINE: Well, we then moved to have — after Judge House refused to rectify, then we requested the Court compel him to rectify it.

JUSTICE HULL: Of course, this Court can always sent it back for further articulation if we think that's necessary —

MR. LAPINE: We asked for further articulation of the Appellate Court and we did not get it. After Judge House refused to include these undisputed facts, we asked that —

JUSTICE HEALEY: Did you ask that they order him to articulate? Is that what — what did you do?

MR. LAPINE: Justice Healey, I think the sequence was we asked for — obviously, you see our request for an articulation rectification. Judge House's response is typed on the bottom of page — the last page, page 36. I think we then went to the Appellate Court to ask that he be compelled to articulate.

JUSTICE HEALEY: And they denied it?

MR. LAPINE: They denied it.

JUSTICE HEALEY: I see.

JUSTICE HULL: You didn't seek review of that denial.

MR. LAPINE: We didn't seek review. We didn't seek review.

JUSTICE HULL: So, as I said before, you're stuck within the confines of the record before us.

MR. LAPINE: Well, I —

JUSTICE HULL: We can't go as a fact that this was only intended to apply to a Federal condemnation in light of our discussion over the last three or four minutes.

MR. LAPINE: Well, I think I can make that argument, Justice Hull, just on the basis of the language of the — the language of the condemnation —

JUSTICE HULL: Well, that's a different matter.

MR. LAPINE: — and the legislative history —

JUSTICE HULL: That's a different matter.

MR. LAPINE: — and the legislative history of the act.

JUSTICE HEALEY: In other words, by deduction, deduction, you're saying they didn't have the power until '81, as a State, to condemn, ergo the only condemning authority prior to '81, and at the time the lease was originally signed, was the Federal government. Is that the situation?

MR. LAPINE: That's the only —

JUSTICE HEALEY: Yes, sure. Sure.

MR. LAPINE: — that's the only authority I would know of that could have condemned this. Maybe there are others. I know the State didn't have it and that's our point.

JUSTICE HEALEY: The state of the law, the lack of the power to condemn, and also the language of Article 28 itself, as a matter of law, your position is that Justice House erred.

MR. LAPINE: Absolutely. Our argument that I'm making today, I made at the trial level and I think as a matter of law, Justice House, there was really no dispute in fact; as a matter of law, Justice House should have found in our

arguments that the condemnation doesn't apply to fix damages and that this specific provision doesn't make sense and doesn't apply. And, also, the legislative history that at the time of the entering into the lease, there was no law or authority for the State to condemn its leasehold interest, and, therefore, it would be unfair and improper —

JUSTICE SHEA: Let me ask you this. If there had been a Federal condemnation rather than State condemnation, what would the difference and result have been mathematically here? In other words, you'd have, I guess, basically a larger award against which this fraction would be multiplied against, is that true?

MR. LAPINE: Justice Hull, the question is, what —

JUSTICE SHEA: I'm Justice Shea.

JUSTICE HULL: He's the better looking one, that's how you tell us apart.

JUSTICE SHEA: Flattery won't help.

MR. LAPINE: I'm sorry, Justice Shea. The issue — the question, before I can answer it, what is the Federal government condemning? If they're condemning the fee interest of the demise premises, then the formula would come into effect. The condemnation here, as stated in the condemnation documents, was for the leasehold interest. Under — if the Federal government condemned our interest, our leasehold interest, we would be entitled to the entire award less what we have to pay the State for our rent. It's right in on page three.

JUSTICE CALLAHAN: But, if the Federal government had condemned under the exact same circumstances here on the 31st of August and condemned the entire demise premises, you would have been right where you are now.

MR. LAPINE: If the Federal government had condemned the entire demise premises?

JUSTICE CALLAHAN: Yes, and during the term of the original lease.

MR. LAPINE: The formula would come into effect. We concede that.

JUSTICE CALLAHAN: Yes, okay, I just want —

MR. LAPINE: We concede that.

JUSTICE CALLAHAN: I understand that. It's your position as a matter of law, 28 did not apply.

MR. LAPINE: Absolutely, because, A, the entire demise premises wasn't condemned.

JUSTICE SHEA: But, getting back to my question, that's — in other words, if there had been what you contemplated, at least according to your claim, the formula would still be applicable as contained in the lease, but it would have been applied to an award which would have been a great deal higher because of the fact that the government wouldn't be taking both the fee and the leasehold, is that right?

MR. LAPINE: No, I don't think — no, our award wouldn't have been any larger, because the sharing —

JUSTICE SHEA: Well, I'm a little confused then. How would you be prejudiced if you say the total award — obviously, this condemnation clause contemplates, under your theory, that the Federal government might come in and condemn the whole property which at the time of its demise to your client as a leasehold, and whatever the number they decided, they would, of course, put that on the total value of the land and facilities that were being taken and then this clause would come into play to apportion that award based upon the value of the leasehold interest.

Isn't that basically what you — what this clause, according to your claim, was designed to do?

MR. LAPINE: Yes, the clause was designed, if the fee was taken, if the demise premises was taken, then our share of that award would be determined by this formula which is predicated on our investment and the amount of days left in the original term of the lease, if it was done during the original term of the lease.

JUSTICE SHEA: So your position, even if we were to adopt it, would be not that the clause falls entirely out of the

picture, but that in applying the clause fairly you would have to hypothecate an award for the value of the whole land and then decide what the value of the leasehold interest was in relation to that. Isn't that right?

MR. LAPINE: No, Justice Shea, not under these circumstances. If the State took the leasehold interest, that's the notice of condemnation. It's the leasehold interest.

JUSTICE SHEA: I understand that, but, basically, your claim of the unfairness of this clause is based, as I see it, upon your claim that this is only planned where some third party such as the Federal government would exercise the condemning authority. In that event, they would not only take the leasehold interest, they would take the fee. Isn't that right?

MR. LAPINE: No, Justice.

JUSTICE SHEA: No?

MR. LAPINE: I'm not saying the clause is unfair. I'm saying the clause was misapplied. I'm saying that — I think what you're driving at, Justice Shea, is that we'll get more money — we feel we would get more money if the fee and the leasehold were condemned together. That's not the case. I'm sorry —

JUSTICE SHEA: I don't know whether you would or not. I just wondered how that would work out because it appears that your claim is based upon the idea that this clause, from the way it is drawn, and from the status of the law at the time the lease was entered into, never contemplated a condemnation by the State, but contemplated a condemnation by the Federal government, and, in that event, in the event of a condemnation by the Federal government, the Federal government undoubtedly would have taken not only the leasehold, but also the fee. They would have taken the State's interest in the property and they would have arrived at a number which corresponded to the value of that — of what was the State's interest. They would have arrived at — they would have condemned it at the value of all of the facilities taken, which would necessarily include the leasehold, and then, at that point, this clause would come in to apportion that award. Isn't that the way you would construe this clause?

MR. LAPINE: If the fee was taken. But, you're surmising that if the Federal government had to take the fee —

JUSTICE SHEA: Yeah, in other words, your claim is that that is what was contemplated. That's what the purpose of this clause was. You never contemplated the taking of a leasehold all by itself.

JUSTICE HEALEY: You have about two minutes left, sir.

MR. LAPINE: Oh, absolutely. Absolutely. The condemnation clause provides for that. It says if the tenant's interest is taken, then the award will not be shared with the State of Connecticut except for the rent. So, that was contemplated, Justice Shea. It wasn't that the only event in which this condemnation clause would be effectuated or activated is if the Federal government took the fee interest. No. It also provides for the Federal government taking the fee interest for a temporary time or taking the building or taking the tenant's interest. So, it did contemplate that. And, that's our point. Here the tenant's interest was taken, the leasehold interest was taken, so the formula has no bearing whatsoever. We'll jump down —

JUSTICE SHEA: Well, supposing the Federal government took just the leasehold interest, as you say, and that was contemplated and decided that that was worth a million dollars, why wouldn't this formula still apply in apportioning that award then?

JUSTICE HEALEY: Before you answer that, I indicated a few minutes ago you had about two minutes, so, go ahead.

MR. LAPINE: Fine. Why? If they said it was worth a million dollars, why wouldn't the formula apply? Because the formula — the condition precedent for the formula is a condemnation of the demise premises, meaning —

JUSTICE SHEA: And the demise premises is an ambiguous term which can be construed to mean taking the fee itself or it can be construed to mean taking the leasehold interest.

MR. LAPINE: Not in this clause, Justice Shea. I disagree. It is not ambiguous whatsoever and that's because the clause distinguishes between demise premises. It says demise premises or tenant's interest. That's distinguished. The construction law is that when those terms are used in the same paragraph or the same clause, they have to have different meanings, and they do have different meanings. I don't claim it's ambiguous at all, not in the least. I won't agree with that with respect, maybe generally, but certainly with respect to this clause. This clause itself makes a distinction, Justice Shea, between demise premises and the tenant's interests.

JUSTICE HEALEY: That just about uses up your time, sir. Thank you very much.

Mr. Lombardo.

MR. LOMBARDO: Good afternoon, gentlemen, I'm Michael Lombardo, Assistant Attorney General representing the Department of Transportation.

JUSTICE HULL: Did you draft this agreement?

MR. LOMBARDO: No, I did not, Your Honor. That was drafted in 1961 and I wasn't around then. I wasn't around in the Attorney General's office.

JUSTICE CALLAHAN: You were alive then, though.

MR. LOMBARDO: Yes, I was, Your Honor, but I was — at that time I was probably controller of a steel mill in Willimantic, in 1961.

In any event, a couple of things. The record, the memorandum of decision which is page twenty of the record, page two of the memorandum, indicates that the option agreements were exercised in 1969. It's really 1979 and the transcript will prove that. I just wanted to call attention to that date because it's quite important.

And, secondly, the Plaintiff, Bradley, did ask the Appellate Court —

JUSTICE CALLAHAN: Why is that important if —

MR. LOMBARDO: I'm sorry, sir?

JUSTICE CALLAHAN: Why is that important if the — if 28 is construed as Mr. Lapine advocates it be construed, the option periods would be considered whether it was exercised or not, wouldn't it?

MR. LOMBARDO: Because the record shows, and also in the briefs, there's indication that Bradley Facilities was told by the Department of Transportation that they were — that the Department of Transportation was going to terminate their lease and they immediately exercised the options and I think the posture of the case, that would indicate what the posture of this case really is, that they were trying to get an extra eight or ten years on the term in order to come into the Court and say, "We are due a million bucks for an option period." And I think it's important that this Court consider and determine what Bradley Facilities was really doing in this particular case.

They signed two contracts. They signed a lease agreement and they signed a stipulation and they knew what they were doing. They come into this Court and they've been in to the Trial Court. I've heard this same litany over and over again. It's been recited several times in the Trial Court and based on two agreements. Now they want this Court to say, No, let's ignore those agreements and let's give them their million dollars based upon the eight year period left in the options.

JUSTICE CALLAHAN: What two agreements are you talking about? The lease and the stipulation?

MR. LOMBARDO: Pardon?

JUSTICE CALLAHAN: What two agreements? You're talking about the lease —

MR. LOMBARDO: I'm talking about the lease and stipulation —

JUSTICE CALLAHAN: — and the stipulation?

MR. LOMBARDO: — and both of those agreements, signed by the parties with full knowledge of the events, control the action in this case.

Bradley Facilities states — they said the State did not have authority to condemn that leasehold interest in 1961. That is not true. The State has always had an inherent right to condemn property. The fact of the matter is, this Court addressed that very issue as far back as 1847 and I found a case, Clark versus Saybrook, 21 Conn 313 and at page 324 this Court said that the State has an inherent right to condemn property and the people have delegated that right to the legislature. And following on to the cases up to —

JUSTICE SHEA: But I gather that until this statute previously referred to was passed, that's 13b-42e, the Department of Transportation had no authority to —

MR. LOMBARDO: That's correct, Your Honor, but the State did and all the Commissioner of Transportation had to do was go to the legislature and ask for a special act to pass to condemn that building. The State had the right to condemn that building and the fact of the matter is in 1941 —

JUSTICE SHEA: So you're saying that we read into the lease not only the laws existing at the time the lease was executed, but also any laws which might be enacted in the future, is that right?

MR. LOMBARDO: Well, the law that was enacted that was referred to in this Court this morning, 13b-42e, was simply an enabling statute that enabled the Commissioner of Transportation to perform the act of condemnation as opposed to the Legislature. They merely delegated their authority with that statute by passing —

JUSTICE HULL: Does the legislative history back up this narrow interpretation you give to that?

MR. LOMBARDO: I have cases. The fact of the matter is, in 1941, the —

JUSTICE HULL: In the record? In the record? In the legislative history that's in the record before us?

MR. LOMBARDO: No, the case I'm citing now? No, I'm —

JUSTICE HULL: Well, I'm sorry I asked about it, then. We can't go beyond the record.

MR. LOMBARDO: Well, Your Honor, the case that I'm referring to, this is case law, the Town of Danbury in fact did condemn a leasehold interest of the Danbury Airport Corporation and that was in 1941 and that's reported in 9 Conn. Sup 320. In that case, the Court said the Plaintiff merely seeks to break — the claim of the Defendant was that the Plaintiff was wrong because Plaintiff merely seeks to break a lease given by the Plaintiff to the Defendant, and the Court said, "So what? If that's what happens, that's what happens," and that a leasehold interest is property subject to condemnation under the inherent powers of the sovereign to condemn property. And the Courts have addressed this problem.

JUSTICE HEALEY: So, it's your position, sir, on this that the Clark case, that old case, was built into the lease when this was executed, is that —

MR. LOMBARDO: What was the law of the land at the time the lease was entered into. Bradley's coming here —

JUSTICE HEALEY: No, that's your position, okay.

MR. LOMBARDO: I'm not just saying the Clark case, Your Honor, but a series of cases throughout the years. The fact of the matter is there's an excellent case in 1952, New England Gas Transmission versus Collins, that had a tremendous discussion of inherent right of the State to condemn property, and that's 138 Conn 582, a 1952 case. And at page 586, the Court went on to discuss the fundamental principle of law, that the power to appropriate private property for public use is an attribute of the sovereign and essential to the existence of government. It lies dormant in the State until set in motion by legislative enactment.

And the Bradley Facilities would have or could have been fully aware of the law of the land and I submit to this Court that Bradley Facilities knew what the law was when they signed that lease agreement. They certainly knew what the law was when they signed the stipulation because the Public Act in 1981 was passed which created 13b-42e. That was

passed in August of '81. The stipulation was signed in August of '82, so, even at the time they signed the stipulation, they were fully aware that condemnation could take place.

JUSTICE SHEA: Well, that stipulation, do you claim anything, that that did anything more than establish the date of the condemnation?

MR. LOMBARDO: It did more?

JUSTICE SHEA: No, do you claim that it did anything more than establish the date of the condemnation —

MR. LOMBARDO: No, I'm not claiming it did anything more. I'm simply claiming that it established a date and the purpose of establishing the date of August 30th, 1982 was clear to all parties. And, the fact of the matter is, there's testimony in the case by witnesses for Bradley —

JUSTICE CALLAHAN: And what was that purpose? To establish the date of condemnation or was it —

MR. LOMBARDO: Establish the date of the condemnation, to bring it within the initial terminal lease agreement.

JUSTICE CALLAHAN: But the stipulation did not in any way indicate that Bradley concurred in your view of Article 28 in the lease, did it?

MR. LOMBARDO: Article 28 had to — they had to agree to that because if it was brought in during the original term of the lease agreement, Article 28 had to apply. The second portion of Article 28 could not apply because if you read the second portion, it states that if this is a partial taking, the lease shall continue in effect and in this particular case, the lease did not continue in effect. This was not a partial taking of a leasehold interest. This was a total takeover of the leasehold interest and, furthermore, they argue that the term demise premises and leasehold interest are not one in the same. Yet, on page one of the lease, demise premises is defined as being a leasehold interest and that was part of the contract as well.

So, the terms of the lease and the terms of the stipulation clearly indicate to all parties, including Bradley Facilities that the State intended to condemn on the next to the last day of the lease in order to bring the condemnation within the initial term of the lease agreement so that Article 28 would apply and that all Bradley would get would be the unamortized value of the leasehold improvements and that's consistent with the principles of accounting. It's consistent with —

JUSTICE HULL: Do you think they understood that's all they were going to get, a hundred and forty-six dollars?

MR. LOMBARDO: Your Honor, if any accountant, any individual knowledgeable in business would know that if you read that clause, that all they were entitled to, and this is the principle of accounting, if you have a leasehold interest and you make improvements on the leasehold, you have to amortize those improvements over the terms of the initial lease, not during the option period in the initial lease because they must be written off during the initial lease. Nobody can really anticipate whether the option periods are going to be exercised or not.

JUSTICE HULL: And the dicker was they got two more years use of this but the State agreed to the date of condemnation. The State was able to get that to tie it within the original term, right?

MR. LOMBARDO: Absolutely. The State got the original date of condemnation and Bradley got two additional years of occupancy.

JUSTICE HULL: Isn't that the essence of the proposition here?

MR. LOMBARDO: It's what?

JUSTICE HULL: That's the essence of the deal that went down here?

MR. LOMBARDO: That's exactly it.

JUSTICE HULL: They got two more years, the State didn't get that eight years tacked on, right?

MR. LOMBARDO: And then when Bradley got their two years, they came into Court and said, "Court, foul, we didn't mean to do that, we want our million dollars based upon the eight years left in the option periods."

And the same argument was made at the trial level. It was analyzed. The fact of the matter is, we started trial in October and at that point, this issue was raised and we recessed and the Trial Court asked for briefs on this very issue, a demise premises as opposed to leasehold interest, and the Court had the briefs and then we resumed trial again in February after all this consideration was made.

And even the motion for articulation, which was really denied by Judge — Justice House, rather. Then there was a motion for review filed with the Appellate Court and that motion for review was granted, but the relief requested was denied and I think that's important as well because the record will show what the posture is by — if the Court looks at this motion for review and the objection to the motion, I think the entire case is spelled out in those two documents.

But, nevertheless, also, the fact that Bradley insists that the State had no right to condemn the leasehold interest at the time the contract was entered, that is just simply not correct because the State has always had the inherent power to condemn all property.

JUSTICE SHEA: Let me ask you this: Your opponent, Mr. Lapine, claimed that at the trial there was some evidence that was presented in regard to, or that would indicate that what was really being contemplated and that the purpose of this clause at the time the lease was executed, was a possibility of a Federal condemnation. Now, what do you have to say about that?

MR. LOMBARDO: I say — the first thing I say about it is the evidence that was alluded to, Exhibits M, N and O, I believe, of the record, there were three memorandum back and forth between counsel and DOT officials, and the

memorandum said, I feel that if this clause applies, if the Federal government condemned the property, and there was some memorandum, some discussion, and the people in DOT said, We don't agree with you, or something of that nature. And tehre (sic) (there) was ano (sic) (no) official opinion written. There was no research done on it. It was just a memorandum back and forth between the counsel for the DOT and —

JUSTICE SHEA: So you challenged the weight of those exhibits, is that right?

MR. LOMBARDO: Absolutely, Your Honor. It was considered by the Trial Court. These letters were in evidence, they were before the Court.

The fact of the matter is, the attorney that wrote the memos was on the witness stand and he was questioned on the witness stand at the trial level and the Trial Court made the determinations. This is not a printout memorandum of decision. It's not a denial of a motion granted. This is a comprehensive memorandum of decision written in the Trial Court which covered all of the aspects of this case and the fact of the matter is the factual —

JUSTICE SHEA: Well, you say all the aspects, but as I — is there anything in the memorandum about this particular issue as to whether or not a Federal condemnation was being contemplated and that that was the purpose of this clause? Is there anything in the memorandum —

MR. LOMBARDO: There's nothing in —

JUSTICE SHEA: — of decision about that?

MR. LOMBARDO: — the memorandum that I remember mentioning the Federal —

JUSTICE SHEA: But you said that issue was raised in the Trial Court and now you said the memorandum was very comprehensive but there still is nothing that you can point to which indicates that this issue was even considered by the Trial Court.

MR. LOMBARDO: Well, it was raised in the Trial Court in argument, Your Honor, and it's raised this morning by Counsel and that's exactly what was done in the Trial Court. So, the Court was well aware that this argument was made. And, furthermore, —

JUSTICE SHEA: But it's not addressed. The Trial Court made no findings in that respect. You concede that.

MR. LOMBARDO: Not that I recall. But —

JUSTICE SHEA: And there was a motion filed for an articulation or for further articulation of the memorandum of decision which was apparently denied and I gather it did relate to this subject, is that correct?

MR. LOMBARDO: I don't remember whether the motion of articulation addressed the Federal question or not. I can't remember that.

JUSTICE HEALEY: Well, the Federal question was whether or not he would find as a fact that the Defendants knew that condemnation pertained to a Federal condemnation, paragraph 13, and he refused to find that as a fact. The claims of law that he suggests, that he indicates were made, which he states were made, do those include a claim about knowledge that a Federal condemnation was envisaged?

I'm looking at page thirty-four of the record where the claims of law are involved. Is it your position that this was —

MR. LOMBARDO: I have —

JUSTICE HEALEY: When you say it was raised in the Court below, paragraph Roman Numeral III, are the claims of law that Justice House said were raised. Now, is the knowledge of the Federal condemnation included in any of those claims of law that are made there? Or is it just in paragraph thirteen, as to the finding as a fact?

MR. LOMBARDO: I see paragraph thirteen says the Defendant knew that the condemnation provision pertained to a Federal condemnation.

JUSTICE HEALEY: And he refused to find that as a fact.

MR. LOMBARDO: Well, he didn't find any of the facts. He refused to find all the facts. He just — he said the question, the issues of law as raised were raised during trial.

JUSTICE HEALEY: Well, when you said the claim that only a Federal condemnation was envisaged, was raised in the Trial Court, do you mean as a claim of law or as a claim of fact?

MR. LOMBARDO: Well, Your Honor, just a minute, I think you said only a Federal condemnation. This doesn't say that. This says —

JUSTICE HEALEY: No, no, as I understand, Mr. Lapine said one of his claims is that because of the state of the law and because of his existing law argument, at the time the lease was signed that only a Federal type condemnation could be involved. You differ with that.

MR. LOMBARDO: That's the argument he's making today.

JUSTICE HEALEY: All right.

MR. LOMBARDO: But even if that is the argument, fine, but that was not what was requested in the articulation. In paragraph thirteen, he's asking the Court to find the Defendants knew that the condemnation provision pertained to a Federal condemnation. It didn't say only a Federal condemnation, number one, and —

JUSTICE HEALEY: Oh, all right.

MR. LOMBARDO: — number two, it doesn't make any difference. What difference would it make? Condemnation is condemnation and the State — the sovereign has the inherent power to condemn.

JUSTICE HEALEY: I understand your position is that there's the cases dating from 21 Conn down saying that the State has an inherent right to condemnation.

MR. LOMBARDO: Absolutely. And, furthermore, if the Federal — to answer the question earlier — if the Federal government did condemn, the damages to Bradley Facilities would be a hundred and forty-five dollars and thirty-eight

cents — a hundred and forty-six dollars and thirty-eight cents — still because of the operation of the agreement. It's an apportionment. Your Honor, —

JUSTICE SHEA: You're saying — I asked this question of Mr. Lapine and you apparently are saying that he wouldn't be benefitted if this had been a Federal condemnation.

MR. LOMBARDO: Your Honor, it wouldn't make any difference if the Federal government took that property for five million or thirty billion dollars. It wouldn't make any difference. All Bradley Facilities would be entitled to under the condemnation would be the unamortized value of the leasehold facilities. They had one day left on there to amortize the improvements made to that lease and one day's value, unamortized value, of those improvements was a hundred and forty-six dollars and thirty-eight cents. It was calculated by a CPA and there's no two ways about it. No matter what the damages were to the owner of the premises, the leasehold interest is worth the unamortized value and that's what they agreed to. It's a common clause in a lease, in the sharing of condemnation awards. It's not just in this lease, it's a very common clause. As I mentioned earlier, it's the principle of accounting.

JUSTICE CALLAHAN: Isn't that one of Mr. Lapine's points, that it's a common clause in proportioning condemnation awards, it does not contemplate the lessor condemning the lease itself?

MR. LOMBARDO: It does not contemplate the landlord condemning the lease.

JUSTICE HEALEY: Do you want to get back in front of the microphone, please? It helps us with the cassette if you stay there.

MR. LOMBARDO: I'm sorry, I have difficulty seeing over the microphone and hearing —

JUSTICE CALLAHAN: Isn't that his point, that it is a common clause where there is a condemnation by a third party, that 28 does not apply because it simply did not contemplate the landlord, the State of Connecticut, condemning the leasehold interest?

MR. LOMBARDO: That's his claim, but I don't think it's a valid claim, Your Honor, because the condemn — it says condemnation and condemnation is accomplished by the sovereign, whether it be the Federal government or the State governments and I just can't envision that anyone knowledgeable of the law or business activities would not contemplate that the sovereign State of Connecticut would condemn those facilities. And, as I said, a mere cursory review of the law would — indicates that it has even happened in the Town of Danbury.

JUSTICE CALLAHAN: Why would they talk about proportioning an award then? Why the State of Connecticut is not giving — the State of Connecticut's not getting anything here? Why would they talk about —

MR. LOMBARDO: Well, I can only guess about that and my guess is that — excuse me. In the State of Connecticut, buildings are owned really by the Commissioner of — it used to be Public Works and now it's Administrative Services — and in the statute it's indicated that he is really the — that the Commission owns all the facilities in the State and then —

JUSTICE CALLAHAN: And the State could have condemned and given the money to the Commissioner?

MR. LOMBARDO: Well, if they wanted to transfer some funds, I don't think that would effectively take place, but I can envision it happening. Well, it could happen because, for example, we have a building over in Wethersfield that was built with Federal money, the Labor Department building, and that building is under the control of the Commissioner of Public Works and so forth and so on, and, if it's condemned, then there could be some moving of money around.

JUSTICE CALLAHAN: Well, if that was intended, wouldn't it make a lot more sense to indicate if the State condemns the leasehold interest we will pay you X number of dollars in accordance with a certain formula.

MR. LOMBARDO: I don't think it was necessary to make that statement because —

JUSTICE CALLAHAN: Rather you think it made sense to word the clause in the way it was worded, which seems to contemplate a third party condemnation and an actual award?

MR. LOMBARDO: No. I don't think it makes any difference, Your Honor, because, as I mentioned, the intent of the clause is to give back to Bradley Facilities any value of the leasehold improvement that they did not use during the term of the lease. They made improvements of over a million dollars in 1961 and they had a a right to participate in that — in those improvements. If the time for participating in those improvements is extinguished because of time, for example, the expiration of the original lease or because of the condemnation, then all they are entitled to is the unamortized value of those improvements.

JUSTICE HULL: Mr. Lombardo, have you answered Justice Callahan's question? Why would the language have to be there for the State to have an apportionment of an award if it's the condemnor itself? Does that make any sense? It's talking about apportioning the award. Well, the State doesn't need any apportionment, the State's the condemnor. Isn't that very telling language against your position?

MR. LOMBARDO: In this particular case the State gets zero, but the leasehold interest — the party holding the leasehold interest still gets the unamortized value of their leasehold improvements. It doesn't make any difference how much money the owner of the fee gets, as I mentioned a moment

ago. It could be thirty million, it could be five hundred billion. All Bradley was entitled to is a hundred and forty-six dollars and thirty-eight cents, under any principles of construction of the agreement or accounting.

JUSTICE CALLAHAN: But doesn't the lease, the contract, doesn't the intent of the parties at the time it's entered into come into play and it (sic) (if) there was no intention, and the wording seems pretty clear that it was intended as a third — contemplated as a third-party condemnation — if the parties didn't have any intention as to what they would do if the State of Connecticut was the condemnor, does 28 apply at all?

MR. LOMBARDO: Well, the intent of the parties is determined by the wording of the lease and I think that the wording —

JUSTICE CALLAHAN: Which seems to indicate that it's to proportion an award from a third party to the State of Connecticut.

MR. LOMBARDO: It doesn't say anything about a third party, Your Honor. It says —

JUSTICE CALLAHAN: No, it talks about proportioning. The State of Connecticut can't proportion nothing.

MR. LOMBARDO: It says that the portion of the award that shall be attributed to the leasehold interest will be the unamortized value of the leasehold facilities. That's all it says.

JUSTICE SHEA: Well, I have trouble getting the language you're relying on, "And there shall be paid or turned over to the tenant as or from the award for such taking."

So, it could be that there wouldn't be any apportionment because it speaks about turning over to the tenant as the award for such taking a sum called, and it also contemplates, "Or from the award for such taking." But, in other words, it uses both — both words are used.

In this case your claim is that you're turning over to the tenant as the award for taking the leasehold, the sum that Judge House calculated.

MR. LOMBARDO: It says, "There shall be paid — "

JUSTICE HEALEY: What paragraph? You're on page —

MR. LOMBARDO: I'm on page twenty-one —

JUSTICE HEALEY: Okay, what paragraph?

MR. LOMBARDO: —of the record which is paragraph 28 of the lease contract.

JUSTICE HEALEY: What paragraph are you in, sir?

MR. LOMBARDO: Page twenty-eight, paragraph 28, and I'm in the same sentence as Your Honor. It says, "There shall be paid or turned over to the tenant as the award for such taking —"

JUSTICE HULL: As or from the award, so that your argument is that —

MR. LOMBARDO: Take out the "or from," forget the "or from," Your Honor.

JUSTICE HULL: No, but the way it is, that could apply "as" for a State condemnation and "from" the award for a Federal.

MR. LOMBARDO: Different for a third party, right. So, if you just take out the "or from," use the word, "as," — shall be paid over to the tenant as the award for such taking a sum calculated. Now, I think that really is the crux of the whole problem.

JUSTICE HEALEY: Thank you very much.

MR. LOMBARDO: Thank you, Your Honor. Thank you, gentlemen.

JUSTICE HEALEY: You've used your time. One minute, please keep that in mind. We'll give you one minute.

MR. LAPINE: The only point I wish to make is this is a condemnation of a leasehold, of a leasehold interest, and had the stipulation been we were giving up our interests in the award in order to get two more years, the stipulation, I believe, would have stated that instead of we are not waiving any right to our damage and we're not acquiescing to the State of Connecticut's position.

JUSTICE HEALEY: Thank you.

* * *

Sec. 15-79. State or municipal airports; establishment. Taking of land or interest therein. The state or any municipality, or any two or more municipalities jointly, may establish, maintain and operate an airport at any location within the state approved by the commission and by the municipality or municipalities within which such airport is to be established, and, where such airport is established by a municipality or two or more municipalities jointly, such airport shall also have been approved by such municipality or municipalities in the following manner: Towns, by vote of the town; cities, by vote of the city council; and boroughs, by vote of the borough; and may take any such land or interest therein for such establishment or for the expansion or improvement of an airport when, in the opinion of the commission, public convenience or safety requires, and when the approval of the municipality or municipalities in which such land is located has been legally obtained, upon paying just compensation to the owner of such land or interest therein. In case the state or such municipality or municipalities cannot agree with such owner upon the amount of such compensation, the same shall be determined in the manner prescribed in section 48-12 for the taking of land for state institutions; but an appeal from the amount so determined shall not act as a stay of the taking of such land, provided no facility or land or interest therein held by a public service company for service to the public shall be so taken or removed unless, at the expense of the party seeking such taking or removal, an adequate and equal substitute approved by the public utilities commission shall first be provided. (1949 Rev., S. 4824.)

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Sec. 430. Reference to Trial Referee

In addition to matters required to be referred to a trial referee, the judicial authority may refer any civil nonjury case or, with the written consent of the parties or their attorneys, any civil jury case, pending before such court, in which the issues have been closed, to a trial referee, who shall have and exercise the powers of the superior court in respect to trial, judgment and appeal in such case. Any case referred to a trial referee shall be deemed to have been referred for all further proceedings and judgment, including matters pertaining to any appeal therefrom, unless otherwise ordered before or after the reference. The court may also refer to a trial referee any short calendar matter and any other pretrial matter in any civil nonjury or civil jury case.

CASES IN THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

* * *

21 Conn. 313 (1847)

p. 313

Clark *against* The town of Saybrook:

IN ERROR.

* * *

The power of eminent domain, of which the laying-out of highways is a part, resides in the state, to be exercised by the legislature, unrestricted, except by some constitutional provision.

* * *

p. 324

The power of providing highways for the use of the public, is a branch of what is termed the right of *eminent domain*, which resides in the sovereign authority of a state, (which is here the people, who are the source of all political power,) and is exercised by them, through the instrumentality of the legislature, to whom, by the constitution, they have delegated it, and who must exercise it themselves, or through the agency of subordinate instrumentalities. * * *

TOWN OF DANBURY
vs.
DANBURY AIRPORT CORPORATION

Superior Court Fairfield County File No. 62209

The complaint in an action to condemn a leasehold interest in land for the purposes of a town airport need not allege specifically that the town voted that the action be brought.

It is essential to allege in such a complaint, however, that the town voted to establish an airport and also voted what land should be taken therefor. Allegations that the town is engaged in a project for the enlargement of a certain airport, and that in the completion of the enlargement the town "deems it necessary that it acquire" the leasehold interest, are not the equivalent of these essential allegations (Gen. Stat. [1930] §§ 3092, 5072).

It is not an adequate ground of demurrer to such a complaint that the town seeks merely to break a lease given by the town to the defendant, since while that may be the result, the leasehold is nevertheless property, and, as such, subject to condemnation.

Nor is it a proper ground of demurrer that the premises sought to be condemned are already devoted to a public use. That is a matter to be set up as an affirmative defense and is not an issue of law to be decided on demurrer.

The allegations of the complaint that the taking is for a municipal airport answer a ground of demurrer that no public interest is involved. If elements enter into the case which tend to show that no *bona fide* public interest is intended, that raises an issue of fact and not of law.

MEMORANDUM FILED MAY 13, 1941.

Lazarus S. Heyman, of Danbury, for the Plaintiff.

Willis, Foster & Lister, of Bridgeport, for the Defendant.

Memorandum of decision on demurrer.

INGLIS, J. This is an action to condemn a leasehold interest in land for the purposes of an airport. The first two grounds of demurrer, as it was agreed upon argument that they should be interpreted, are that it is not alleged that the town has authorized either the establishment of an airport, or the condemning of the particular property right involved or the institution of this action.

As regards the last, that is, the authorization for the institution of this action, if the allegations of the complaint as a whole were adequate to indicate that the town had the right to maintain the action, it would follow from that that it would not be necessary to allege specifically that the town had voted that the action be brought. The town itself is the plaintiff. The action must have been instituted by some public official who, it is presumed, is charged with the duty of enforcing by court action whatever rights the town may have. If a municipal corporation has rights, the enforcement of which requires a civil action, it should not be necessary for such municipality to allege and prove that the particular officer who caused the action to be instituted had the express authority of the town to institute that action.

As regards the first two sorts of authority mentioned, however, the case is quite different. "Where the land of an individual is taken *in invitum* for public use, under the provisions of positive law, every requisite of the statute must be complied with, and this must appear on the face of the proceedings for taking the land." *Crawford vs. Bridgeport*, 92 Conn. 431, 435, and cases cited. The right to take the property here in question rests upon section 3092 of the General Statutes,

Revision of 1930, and the method of taking is prescribed by section 5072 of the General Statutes, Revision of 1930.

The first section grants the right to condemn land for an airport only when "any town . . . . may establish an airport" at the location in question. A town can establish an airport only by a vote of a town meeting. It is obvious, therefore, that the petition for the appointment of appraisers must allege that the town has voted to establish an airport and has defined the location of it.

Section 3092 also provides that any municipality which has established an airport "may take any land." This obviously contemplates a vote by the municipality as to what land shall be taken. In that vote the limits of the taking should be specified with reasonable certainty and the petition should contain an allegation of such a vote.

The only allegations along these lines in the petition in this action are that the town is now engaged in a project for the enlargement of the Danbury airport, and that in the completion of the enlargement the town "deems it necessary that it acquire" the leasehold interest. None of this is the equivalent to an allegation that the town has voted to establish an airport or that it has voted to take the interest in real estate sought to be taken in this action. Accordingly, the first two grounds of demurrer are well taken.

The third ground of demurrer is that the complaint seeks merely to break a lease given by the plaintiff to the defendant. The answer to that is that, although that may be the result, nevertheless the leasehold held by the defendant is property and as such is, of course, subject to condemnation.

The fourth ground is that the premises are already devoted to a public use. If that is so it is a matter of fact to be set up by the defendant as an affirmative defense and is not an issue of law to be decided on demurrer.

As regards the fifth ground of demurrer which is that no public interest is involved, the allegations of the complaint are that the taking is for a municipal airport. That obviously is for ã public use and if other elements enter into the case which tend to show that no *bona fide* public use is intended that raises an issue of fact and not of law.

The demurrer is sustained on the first and second grounds for the reasons above set forth and is overruled as to all other grounds.

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Tuesday, May 5, 1981

SENATOR SERRANI: Mr. President.

THE CHAIR: Senator Serrani.

SENATOR SERRANI: Just a further explanation for the need for the bill and the amendment and the amendment does incorporate most of the language in the bill. Right now we have some major time delays in certain projects dealing with transportation particularly in the area of airport expansion and mass transit expansion. This bill for the amendment would cut down on some of the paper work, the timing, roughly three to nine months on many of these projects. As you know, with inflation as it is today, some of these major projects would turn in millions of dollars by being delayed for a month, we're adding a percentage cost onto each project and when you're talking forty-seven million or you're talking a hundred million dollars, that's a good chunk of dollars that the state is not able to make up and with federal cutbacks as they are, it's important that we move quickly on all of these projects and the Department of Transportation is well equipped to do this as they have been doing for many years in the highway and bridge area.

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SENATOR SERRANI: Mr. President, this amendment comes by way of the Department of Transportation and it specifically is designated for the use of expansion at Bradley Airport. The Finance Committee here in the General Assembly has passed one hundred million dollar bonding authorization for the completion of the Bradley master plan and in that the department wants to move ahead with this program, they're in a situation where they must condemn a

lease on the property at Bradley. This would allow the Department again to relocate cargo facility owned by the Bradley Facilities, Inc. The B.F.I. has had a twenty year lease with tenure renewal option. They're currently in the nineteenth year of that lease and D.O.T. department would like to be able to condemn their own lease with this amendment. Now presently the Department of Transportation can condemn a fee simple property interest and they're seeking to do the same here with a leasehold (inaudible). Without the amendment the State of Connecticut, their hands would be tied in the negotiating process at Bradley Airport, so I'd move adoption of the amendment and try to answer any questions you may have on it.

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Wednesday, May 6, 1981

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SENATOR SERRANI: And again, I would state that this amendment deals specifically with the Bradley Airport. The expansion of the Bradley Airport is contingent upon relocating one cargo facility owned by the Bradley Facilities, Inc. They have had a twenty-year lease with a ten-year renewal option. They are in their nineteenth year. The (next word unintelligible) of our lease is with the State. The Department of Transportation would like to be able to condemn their own lease with this amendment. The Department can condemn a fee simple property interest and should also be able to condemn a lease-hold which is a lessor's property interest. Without this amendment one hand of the state will be obviously tied in negotiating with the tenant and without this amendment the one hundred million dollar bond authorization from the Finance Committee, which will be on our desks shortly will not be able to be completed or started without the ability to condemn this leasehold. The Department feels very strongly about this aspect of the bill and I certainly do too considering the cost of construction today and the inflationary cost of roughly one percent a month if we are to hold up the Bradley International Airport we would be doing a great disservice to the public, and to the taxpayers in terms

of the dollars that would be needed to obtain in future years to complete the project.

So I would ask for support for this amendment.

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SENATOR SERRANI: Mr. President, through you, sir. The first question, I guess, was the question of whether or not the same commissioner who made the lease would have the opportunity to condemn that through the bill. The lease in this case was twenty years ago, so it was not the same commissioner. I might say in that light also that there are roughly one hundred leases at the airport, ninety-eight of those one hundred leases have incorporated within the agreement the understanding that the condemnation of the leasehold is part of that arrangement. There are only two that do not have that understanding or at least some clear understanding of that. I think the intent is there but it is unclear of that understanding, and therefore, that's why the legislation, the amendment is before us. Again, the reason there are two out of that one hundred with an unclear statement as to the opportunity for condemnation of their leasehold is that those leases were perpetuated some twenty years ago, and therefore were not of recent vintage.

As to the provision of the decision being conclusive that follows the existing statutory language under Section 13b-42, subsection (c) under the Aeronautics portion of the Department of Transportation's statutes whereby the commissioner has that same right with the municipal airports and the language used there in subsection (c) is conclusive, and so it just follows the existing statutory language in those subject areas of transportation.

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House of Representatives Wednesday, May 27, 1981

DEPUTY SPEAKER FRANKEL: The question is on acceptance of the Joint Committee's favorable report and passage of this bill in concurrence with the Senate. Will you remark, Rep. Pier?

REP. PIER: (15th) Yes, Mr. Speaker. Ladies and gentlemen, this bill which we have before us is a rather important priority item for the development of public transportation projects in the state of Connecticut. It is keyed primarily to enabling legislation for the expansion and development of Bradley International Airport but also affects other major transportation facilities including rail stations and the like.

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REP. PIER: (15th) Mr. Speaker and ladies and gentlemen, Senate Amendment "C" is really substitute language for what appeared out of the Transportation Committee as transportation bill 7291. It kind of got lost in the shuffle in the last day in Government Administration and Elections and what it provides is the authority to the Commissioner of Transportation to condemn leaseholds in the same basis as any other property interest at an airport facility.

What has happened is there are two long term leases at Bradley in particular. There is some question there in the 19th year and they have a option to renew which is already been exercised by the holder of the lease. In order to facilitate the development according to the updated master plan, the state is going to need to condemn these leaseholds. It is simply enabling legislation to make it very clear that the state has the authority to condemn the leases. It's probably already true in the law but there is some question at whether it would

have to go to litigation because the law now allows for a condemnation of an interested property in order to facilitate the process and avoid the possibility of litigation, the Department of Transportation has asked for rather clear authority to condemn a leasehold interest.

What we are doing, of course, if not taking property away without compensation. This condemnation would go through the regular process. It would have to be evaluated. If there is a controversey (sic) (controversy) over the amount they attempt to negotiate on a bi-lateral basis without the need for legislation. That hasn't been successful because two leaseholders there have a rather good deal and for some strange reason are not willing to voluntarily give it up.

So what this does is pull that provision back into the statute, allow the Commissioner to condemn leaseholds in the same basis as he can any other property. I move adoption of the amendment.

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SENATE/HOUSE
TRANSPORTATION COMMITTEE
1981

Senate Bill 1425
P.A. 81-421

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State Capitol
Room 419
March 30, 1981
TRANSPORTATION 1:00 P.M.

PRESIDING CHAIRMEN: Senator Serrani
Representative Pier

COMMITTEE MEMBERS PRESENT:

SENATORS: Serrani, Morano, Casey

REPRESENTATIVES: Pier, Atkin, Gelsi, Wilber, Smith, Savage, Kusnitz, Ruwet, Murphy, Conn, Niedermeier, Miscikoski

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COMMISSIONER ARTHUR B. POWERS: Mr. Pier and honorable members of the Committee, I'm here to testify on committee Bill *number 1425.* This is a Department of Transportation bill. It is one which we believe will enhance the speedy and orderly development of Bradley International Airport. And, by the way, the update of the master plan is completed, and Mr. Chairman, it will be distributed to the Governor of the Office of Policy and Management and the Committee staff within the next couple of days. In fact, I expect the Governor will be getting his this afternoon so we will have it, uh, in fact, we can get you one if you want it within a half hour if you want it now.

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